92-653

No. _____

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

FIRST GIBRALTAR BANK, F.S.B.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is the beneficiary of a written escrow agreement, entered into with a federally-insured financial institution with respect to funds actually held on deposit at that institution, the holder of an insurable "deposit" who is entitled to the rights and protections afforded depositors under the federal system of deposit insurance?

II. Can a federally-insured financial institution deprive a depositor of the benefits and protections afforded by the federal system of deposit insurance by intentionally or negligently failing to establish or document properly the depositor's account in accordance with the written instructions of the depositor?

III. Can a federally-insured financial institution deprive a depositor of the benefits and protections afforded by the federal system of deposit insurance by unilaterally and wrongfully purporting to offset the funds on deposit?

[*NOTE*: Petitioner reserves the right to argue Question IV in the event certiorari is granted on the above questions, but does not include Question IV among the reasons for the grant of certiorari.]

IV. Does the unilateral, wrongful offset of an insured escrow account extinguish the deposit liability owed to the beneficial owner of the funds in such account, with the result that a successor institution's express agreement to assume the "Liabilities to Depositors" of the offsetting institution does not include the liability owed to such owner?

LIST OF PARTIES

Petitioner: City of Arlington, Texas

Respondent: First Gibraltar Bank, F.S.B.

Additionally, the Federal Deposit Insurance Corporation submitted a brief in support of Respondent as *amicus curiae* in the proceeding before the Fifth Circuit.

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CITY OF ARLINGTON, TEXAS,

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FIRST GIBRALTAR BANK, F.S.B.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

The City of Arlington, Texas ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on June 17, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 963 F.2d 79 (5th Cir. 1992), and is reproduced as Appendix A, beginning at p. 1a, *infra* (the "Opinion"). The accompanying Judgment of the Court of Appeals for the Fifth Circuit was not reported but is reproduced as Appendix B, beginning at p. 14a, *infra*. The

Order of the Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing is reproduced as Appendix C, beginning at p. 16a, *infra*. The Memorandum Opinion of the United States District Court for the Northern District of Texas, Fort Worth Division (McBryde, D.J.) is reported at 752 F. Supp. 219 (N.D. Tex. 1990), and is reproduced as Appendix D, beginning at p. 18a, *infra* (the "Memorandum Opinion"). The District Court's accompanying Order on Motions for Summary Judgment was not reported but is reproduced as Appendix E, beginning at p. 42a, *infra*.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Opinion and Judgment sought to be reviewed on June 17, 1992. Petitioner's Petition for Rehearing was denied by Order dated July 15, 1992. No extension of time for filing this Petition for a Writ of Certiorari has been requested. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

STATUTES

12 U.S.C. § 1724(b)
12 U.S.C. § 1724(c)
12 U.S.C. § 1725(a)
12 U.S.C. § 1728(a)
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12 U.S.C. § 1811
12 U.S.C. § 1813(l)(1)
12 U.S.C. § 1813(l)(3)
12 U.S.C. § 1821(f)

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12 C.F.R. § 330.1(b)(1) (1988)
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12 C.F.R. § 330.3 (1988)
12 C.F.R. Part 564 (1988)
12 C.F.R. § 564.2(b)(1) (1988)
12 C.F.R. § 564.3(b) (1988)
12 C.F.R. § 564.4(a) (1988)
12 C.F.R. § 564.5 (1988)
12 C.F.R. § 564.10 (1988)
12 C.F.R. § 564, Appendix (1988)

The text of each of the foregoing statutes and regulations is reproduced as Appendix F, beginning at p. 46a, *infra*.

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari is the culmination of over five years of effort by Petitioner to vindicate its right to the benefits and protections afforded depositors under state and federal law and under the broad coverage afforded by the federal scheme of deposit insurance.

This litigation centers around the legal effect of a letter agreement (the "Escrow Letter Agreement") entered into on September 29, 1986, by Petitioner, First Texas Savings Association ("First Texas"), and Shady Valley West Joint Venture ("Shady Valley"), but its genesis lies in previous events, a brief statement of which is necessary to a full understanding of the case.

First Texas was a state-chartered savings and loan association whose deposit liabilities were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"). [Memorandum Opinion, Appendix D, at p. 20a, *infra*]. In 1985, First Texas entered into a loan agreement with Shady Valley, agreeing to loan up to $29,620,000.00 for the acquisition and development of certain real property in Arlington, Texas. [ROA V 4, P

882]. The loan was evidenced by a promissory note ("Note") and secured by a deed of trust lien against the real property. [ROA V 4, P 882-83]. As a part of the loan agreement, Shady Valley was required to provide an unconditional letter of credit from a third-party lender in the amount of $4.1 million to assure the availability of funds to construct Green Oaks Boulevard, a major arterial roadway to be constructed through the property. [ROA V 4, P 883; V 4, P 969]. The agreement relating to the letter of credit specifically provided that all proceeds therefrom were restricted for use in the construction of Green Oaks Boulevard. [ROA V 4, P 883]. This roadway was considered crucial to the success of the development and was also a vital transportation need of the City of Arlington [ROA V 3, P 672], whose citizens had authorized a bond issue to provide funds to ensure the construction of Green Oaks Boulevard, [ROA V 8, P 2016], either by the City or in participation with private parties such as Shady Valley through whose property Green Oaks Boulevard was routed.

In June 1986, Shady Valley and First Texas executed a letter agreement modifying the original loan agreement. [ROA V 4, P 884]. Under the terms of this modification, First Texas submitted a $2,697,993.70 draw on the Shady Valley letter of credit, the proceeds of which were wired to First Texas by the issuing bank (an unrelated financial institution) and thereafter deposited into an account at First Texas styled "FTSA Tr for Shady Valley" (the "Account"). [ROA V 4, P 885-86]. From this draw, $297,993.70 was used to pay accrued interest on the loan, $100,000.00 was to be disbursed to third parties, and First Texas agreed to hold the remaining $2.3 million in the Account for the construction of Green Oaks Boulevard. [ROA V 4, P 885-86].

By written agreement dated September 25, 1986 (the "September 25 Agreement") between Petitioner and Shady Valley, Shady Valley agreed to escrow $2.1 million

in an account at First Texas to be used for the construction of Green Oaks Boulevard, and Petitioner agreed to pay $1.5 million to Shady Valley once the escrow account was established. [ROA V 4, P 889; V 4, P 1071-75]. The $1.5 million was to represent Petitioner's bond fund contribution to the construction of Green Oaks Boulevard and was part of a settlement of a lawsuit involving responsibility for the cost of the roadway construction. [ROA V 8, P 2031-32]. As a matter of fact, at the time of its agreement with Petitioner, Shady Valley considered that the $2.1 million escrow account already had been established as evidenced by (1) the language of the September 25 Agreement ("Shady Valley will deposit the sum of $2.1 million into an Escrow Account with First Texas Savings Association *on or before* the effective date of this Agreement"); (2) the fact that the Account at First Texas to be used for the construction of Green Oaks Boulevard was already in existence; and (3) subsequent events as more fully set forth below.

The next day, September 26, 1986, Shady Valley and First Texas executed a Modification Agreement (the "September 26 Loan Modification Agreement") in which it was agreed to reduce the Account, which had been set aside for the construction of Green Oaks Boulevard, to $2.1 million, the precise amount that Shady Valley had promised Petitioner would be escrowed for the road construction. [ROA V 4, P 887; V 4, P 1002-03].

Three days later, on September 29, 1986, Petitioner, First Texas and Shady Valley entered into the Escrow Letter Agreement, which required First Texas to establish a separate escrow account funded with Shady Valley's $2.1 million and to be styled "Escrow Account-Arlington." [ROA V 4, P 887; V 4, P 1057-59]. The Escrow Letter Agreement, or a copy thereof, was continuously maintained in First Texas' files from and after the date of its execution [ROA V 4, P 887], as well as among the records of Petitioner. [ROA V 6, P 1496]. The funds in the

account referenced in the Escrow Letter Agreement were to be used exclusively for the construction of Green Oaks Boulevard. The Escrow Letter Agreement further provided that if Shady Valley failed to begin or complete construction within certain time frames, then Petitioner had the option to employ its own contractor to complete the project, using the funds in the account to do so. Shady Valley never began construction of Green Oaks Boulevard. [ROA V 3, P 664].

First Texas was accorded no rights to the amounts on deposit other than those set forth in the Escrow Letter Agreement. [ROA V 3, P 664]. First Texas had no ownership, security, or other interest in the $2.1 million, except the right to retain any money left in the Account after the completion of Green Oaks Boulevard and acceptance of the work by Petitioner. [ROA V 3, P 664; V 4, P 1057-58]. Petitioner was not then and never had been a party to the original loan agreement between Shady Valley and First Texas, nor was Petitioner a party to any of the modifications of the loan agreement. Petitioner was likewise not indebted to First Texas. [ROA V 3, P 664]. Petitioner's only relationship to First Texas was as the beneficial owner of a $2.1 million deposit expressly agreed in writing to be maintained by First Texas for the sole purpose of constructing Green Oaks Boulevard under the terms and conditions of the Escrow Letter Agreement. [ROA V 4, P 1057-59].

Upon inquiry by the City Attorney for Petitioner, an officer of First Texas confirmed that the $2.1 million escrow account contemplated by the Escrow Letter Agreement had been established and funded. [ROA V 3, P 663; 963 F.2d at 80; Opinion, Appendix A at p. 3a, *infra*]. Based upon this representation and the written agreement of First Texas to maintain the funds pursuant to the Escrow Letter Agreement, Petitioner paid $1.5 million to Shady Valley in accordance with the September 25 Agreement. However, as Petitioner later learned, the ministerial

act of establishing the separate escrow account under the style "Escrow Account-Arlington" had not been accomplished by First Texas, nor was it ever accomplished. [ROA V 7, P 1809-10]. Nevertheless, all parties considered the Account to be the one called for by the Escrow Letter Agreement and subject to its terms and conditions. [ROA V 7, P 1810-11; Memorandum Opinion, Appendix D, at p. 24a, *infra*].

On or about April 16, 1987, after Shady Valley defaulted on its loan agreement and Note, First Texas unilaterally and without notice to Petitioner purported to offset the deposit in the Account. [ROA V 4, P 888]. As was reflected by the books and records of First Texas, the offset deposit was applied to reduce the separate loan indebtedness of Shady Valley to First Texas. [ROA V 4, P 888]. As authority for this action, First Texas asserted a security interest in the $2.1 million based upon the September 26 Loan Modification Agreement, an agreement made *prior* to the Escrow Letter Agreement and to which Petitioner was *not* a party, [ROA V 4, P 887; V 4, P 1000], and as to which it had no knowledge.

Despite Petitioner's repeated demands, First Texas refused to restore the offset funds. [ROA V 3, P 664]. As a result, Petitioner filed suit in Texas state court against First Texas to enforce the contractual deposit liability established by the Escrow Letter Agreement and to recover the $2.1 million held for its benefit. [ROA V 3, P 664-65; V 1, P 15]. Petitioner also asserted tort causes of action arising from the same events and occurrences. [ROA V 1, P 18-21].

On December 27, 1988, during the pendency of the state court suit, First Texas was declared insolvent and the FSLIC was appointed its receiver ("FSLIC-Receiver"). [ROA V 1, P 209]. The same day, FSLIC-Receiver and First Texas Bank, F.S.B. (later renamed First Gibraltar Bank, F.S.B. ["First Gibraltar"]) entered into a "purchase and assumption" transaction with FSLIC in its corporate capacity ("FSLIC-Corporate"), portions of which were

memorialized in an "Acquisition Agreement" between the FSLIC-Receiver and First Gibraltar. [ROA V 1, P 209]. The resolution of the failed institution through this purchase and assumption transaction is a statutorily authorized alternative to cash payments to depositors, but is equivalent to the provision of deposit insurance as mandated by federal law. *See* 12 U.S.C. §§ 1725(a), 1728(b) and 1729.

The Acquisition Agreement provided that First Gibraltar assumed and agreed to pay "all of [First Texas'] liabilities to Depositors with respect to their Deposits." [ROA V 1, P 231]. The term "Deposit" is defined in the Acquisition Agreement as a deposit of a type that is insurable under Sec. 405(a) of the National Housing Act. [ROA V 1, P 226]. It is not disputed that the Account, a "Money Maker Plus" account, was of that type. [ROA V 7, P 1830-31]. First Gibraltar's assumption of the deposit liabilities was to be "in accordance with the provisions of applicable law and the individual contracts governing [First Texas'] deposits" and "in compliance with the contractual terms of such Deposits." [Acquisition Agreement; ROA V 1, P 233]. Further, the Acquisition Agreement obligated First Gibraltar to "discharge, in the usual course of business, [First Texas'] duties and obligations with respect to its Depositors." [ROA V 1, P 233]. Because of First Gibraltar's assumption of all deposit liabilities of First Texas (without regard to the $100,000.00 federal insurance limit) [ROA V 1, P 226; V 7, P 1820], it was not necessary for the FSLIC to actually pay First Texas' depositors under the deposit insurance statutes and interpretive regulations. [ROA V 6, P 1397-98].

On January 26, 1989, FSLIC-Receiver intervened and removed the pending state court suit to the United States District Court for the Northern District of Texas, Fort Worth Division, pursuant to original and removal jurisdiction conferred by 12 U.S.C. § 1730(k)(1) and 28 U.S.C. § 1441. [Verified Petition for Removal; ROA V 1, P 1].

After the removal of the case to federal court by FSLIC-Receiver and upon First Gibraltar's refusal to honor the deposit liability to Petitioner which was expressly assumed by the terms of the Acquisition Agreement, First Gibraltar was joined as a party defendant to this action by Petitioner in May 1989. [ROA V 1, P 63]. At the same time, Petitioner joined FSLIC-Corporate as a defendant. [ROA V 1, P 63]. The Federal Deposit Insurance Corporation ("FDIC") as statutory successor to FSLIC-Receiver was later voluntarily dismissed by stipulation of the parties [ROA V 6, P 1617-1618], and the FDIC as statutory successor to FSLIC-Corporate was granted partial summary judgment [Memorandum Opinion, Appendix D, at p. 38a, *infra*] and later dismissed from the suit with prejudice. [ROA V 9, P 2356-57].[1] The FDIC as statutory successor to FSLIC-Receiver and FSLIC-Corporate was not a party in the Fifth Circuit Court of Appeals but did appear as an *amicus curiae*.

In May 1990, First Gibraltar moved for summary judgment in the District Court [ROA V 2, P 323], which Petitioner timely opposed, and in September 1990, Petitioner filed a cross-motion for summary judgment [ROA V 2, P 376], timely opposed by First Gibraltar. The District Court granted summary judgment in favor of Petitioner and against First Gibraltar and denied the Motion for Summary Judgment of First Gibraltar. [ROA V 9, P 2237-65; Memorandum Opinion, Appendix D, beginning at p. 18a, *infra*, and Order on Motions for Summary Judgment, Appendix E, beginning at p. 42a, *infra*]. The District Court found as a matter of law that Petitioner was a "depositor" of First Texas, and that under the terms

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[1] The FDIC was substituted for FSLIC-Receiver and FSLIC-Corporate as a party defendant in the District Court pursuant to the provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA").

of the Acquisition Agreement, First Gibraltar had assumed the deposit liability owed to Petitioner. [Memorandum Opinion, Appendix D, at p. 31a, *infra*]. Accordingly, the District Court ordered First Gibraltar to establish and fund an account in the amount of $2.1 million plus interest for the benefit of Petitioner pursuant to the contractual terms of Petitioner's deposit agreement with First Texas. [Memorandum Opinion, Appendix D, at p. 37a, *infra*, and Order on Motions for Summary Judgment, Appendix E, at pp. 43a-44a, *infra*].

First Gibraltar appealed the granting of the summary judgment in favor of Petitioner, as well as the denial of its own Motion for Summary Judgment, to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals rejected the holdings and analysis of the District Court, reversed the judgment in favor of Petitioner, and rendered judgment in favor of First Gibraltar. In so ruling, the Fifth Circuit Court of Appeals held that Petitioner failed to establish that it was a depositor of First Texas, apparently because (1) Petitioner did not show a deposit of its own funds into First Texas; (2) the Account was offset prior to the insolvency of First Texas, leaving no deposit liability to be assumed by First Gibraltar; and (3) the "account records" (undefined by the Fifth Circuit) of First Texas allegedly failed to reflect the deposit liability owed to Petitioner. Because the Fifth Circuit's conclusions on these deposit issues have deprived Petitioner, and its citizens, of a substantial right, and because the ultimate disposition of these issues vitally affects the banking public, Petitioner seeks review by writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Refusal Of The Fifth Circuit To Recognize As A "Depositor" The Beneficial Owner Of Funds Held By A Federally-Insured Financial Institution Subject To An Express Written Agreement Is (a) Contrary To This Court's Reasoning In *FDIC v. Philadelphia Gear Corp.*; (b) In Conflict With Decisions In The District of Columbia And Eighth Federal Circuits; And (c) Fundamentally Inconsistent With The Significant Public Policies Underlying Federal Deposit Insurance.

Not since its decision in *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986) has this Court undertaken to delineate the parameters of "depositor" status in the context of a federally-assisted resolution of an insolvent FSLIC- or FDIC-insured financial institution. The decision of the Fifth Circuit below represents an alarming judicial narrowing of, and portends further restriction of, the historically broad sweep of federal deposit assurance, and, therefore, has significant ramifications for a national banking public schooled to rely upon absolute governmental backing of its deposits. The issues here presented implicate substantial public policy concerns which potentially impact millions of Americans, raising a critical need for Supreme Court attention to the question of just who is a "depositor" entitled to the direct and indirect benefits of federal deposit insurance. The Fifth Circuit's implicit holding in this case that the beneficial owners of deposits held by federally-insured financial institutions are not to be afforded "depositor" status upon insolvency absent an actual deposit *by* the beneficial owner runs afoul of this Court's reasoning in *Philadelphia Gear*, requiring Supreme Court correction. Additionally, an apparent conflict between decisions in the District of Columbia and Eighth Circuits, and that of the Fifth Circuit in this case, requires Supreme Court clarification. Finally, the inherent inconsistency of the Fifth Circuit's decision with the strong

public policies underlying the federal system of deposit insurance reflects such a departure from the accepted and usual course of judicial proceedings as to require Supreme Court intervention.

In its decision, the Fifth Circuit, in determining that Petitioner was not a "depositor" of the failed First Texas, incorrectly stated that this case was not one "in which an actual deposit of money was made to an account," [963 F.2d at 82; Opinion, Appendix A, at p. 8a, *infra*] and further noted, citing *Philadelphia Gear*, that "the FDIC insurance legislation is intended to protect actual money or its equivalent *deposited by the claimant . . .* " [Emphasis supplied.] [963 F.2d at 82, n.7; Opinion, Appendix A, at p. 8a, *infra*]. This limitation of the ambit of federal deposit protection to funds actually "deposited *by* the claimant" finds no support in the law and misconstrues this Court's last teaching on the subject of "deposits" in *Philadelphia Gear, supra.*

In that case, Philadelphia Gear sought to enforce as a "deposit" a standby letter of credit issued for its benefit by the failed Penn Square Bank and backed by a contingent promissory note executed in favor of the bank by Orion Manufacturing, Philadelphia Gear's customer. Because no actual "money or its equivalent" was deposited in the bank *by anyone*, this Court found there was not a "deposit" for federal deposit insurance purposes. However, the Court carefully focused upon the existence *ipso facto* of hard assets, and did not require that the claimant be the person actually making the transfer of funds (the deposit) giving rise to the alleged deposit liability:

> Philadelphia Gear essentially seeks to have the FDIC guarantee the contingent credit extended to Orion, not assets entrusted to the bank by Philadelphia Gear *or by Orion on Philadelphia Gear's behalf*. . . . [H]ere, with a standby letter of credit backed by a contingent promissory note, *Penn Square was not in possession of any of Orion's*

> *or Philadelphia Gear's assets* when it went into receivership. Nothing was ventured, and therefore no insurable deposit was lost. [Emphasis supplied.]

(476 U.S. 439-40). But Justice O'Connor clearly suggested that if "hard assets" had been actually entrusted to Penn Square, a different result would have obtained and pointed to the FDIC's concession in this regard:

> With a standard 'commercial' letter of credit, *Orion* would typically have unconditionally entrusted Penn Square with funds before Penn Square would have written the letter of credit, and thus *Orion* would have lost something if Penn Square became unable to honor its obligations. As the FDIC concedes, deposit insurance extends to such a letter of credit backed by an uncontingent promissory note. [Emphasis supplied.]

Id. at 440.

The case now before the Court presents the situation alluded to in *Philadelphia Gear* wherein "hard earnings" or "assets" were actually entrusted to an insured financial institution which subsequently defaulted. The losses here thus clearly fall within the protections afforded by the system of deposit insurance. As stated in *Philadelphia Gear*:

> Congress' focus in providing for a system of deposit insurance – a system that has been continued to the present without modification to the basic definition of deposits that are 'money or its equivalent' – was clearly a focus upon safeguarding the assets and 'hard earnings' that businesses and individuals have entrusted to banks. Congress wanted to ensure that someone who put tangible assets into a bank could always get those assets back. The purpose behind the insurance of deposits in general, and especially in the section defining deposits as

> 'money or its equivalent,' therefore, is the protection of assets and hard earnings entrusted to a bank.

Id. at 435. Instead, the Fifth Circuit here has focused upon whether Petitioner was a "depositor" in the extremely narrow sense of the term, *i.e.*, did Petitioner directly deposit its own funds in an account. As is reflected by *Philadelphia Gear*, that is not the threshold issue. Rather, the critical question is whether there was a "deposit," an entrustment of "hard assets," in the first instance. Only after a resolution of that issue is it appropriate to determine the identity of the "depositor" with respect to the "deposit."

In the case before this Court it is beyond dispute that some $2,697,993.70 in "money or its equivalent" was actually entrusted to First Texas. A portion of this sum was applied to Shady Valley's indebtedness to First Texas or held for disbursement to third parties, while the remaining funds were maintained in escrow, to be held for Petitioner's benefit, and at its written insistence, in a separate escrow account to be denominated "Escrow Account-Arlington," subject to the express, written terms and conditions of the Escrow Letter Agreement. Petitioner does not seek to create a heretofore non-existent fund through enforcement of its rights as a beneficiary of a phantom deposit, as did Philadelphia Gear. Instead, it seeks to enforce a right evidenced by a written agreement signed by the federally-insured institution governing hard cash actually on deposit for Petitioner's benefit. The Fifth Circuit has misapplied the teaching of *Philadelphia Gear* to Petitioner in this case, with potentially far-reaching implications for others similarly situated to Petitioner. Under the Fifth Circuit's reasoning, the undisputed beneficiary of an insured deposit liability may henceforth be forbidden the fruits of "depositor" status in those manifold instances in American commercial life in which funds are deposited by one for the benefit of another in

reliance upon federal backing of the *res* of the deposit. The narrow focus suggested by the Fifth Circuit does not comport with commercial reality, and is significantly at odds with the public policy which underlies the federalization of bank deposits in the United States.

Well prior to *Philadelphia Gear* it was settled that in defining the scope of federal deposit insurance protection, "the substance of beneficial ownership and not the particular legal form of the account should control." Scott, *Some Answers to Account Insurance Problems*, 23 Bus. Lawyer 493, 504 (1968),[2] *quoted with approval in FAIC Securities, Inc. v. United States*, 595 F. Supp. 73, 79 (D. D.C. 1984), *aff'd* 768 F.2d 352 (D.C. Cir. 1985). In *FAIC Securities*, the District Court held invalid FDIC and FHLBB regulations restricting insurance coverage of brokered deposits, since those regulations would have deprived the beneficial owners of the deposited funds the full measure of insurance protection. The *FAIC* Court stressed that "deposit insurance will run in favor of the *owner* of the deposit . . . " *FAIC Securities, supra*, at 77. [Emphasis supplied.] The federal deposit insurance statutes, the Court said, "quite simply, do not take into account the manner in which deposit of the funds is arranged; they focus instead on who owns the funds." *Id.*, 595 F. Supp. at 78. In his review of the mandatory insurance provisions of the Federal Deposit Insurance Act ("FDIA")[3] on appeal, Justice Scalia wrote:

> These provisions establish a clear and unequivocal mandate that the FDIC shall insure each depositor's deposits up to $100,000, determining the amount of those deposits by adding together

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[2] Mr. Scott at the time he authored the article was General Counsel to the Federal Home Loan Bank Board ("FHLBB"), overseer of the FSLIC.

[3] Pub. L. No. 73-6, 64 Stat. 873 (1950), 12 U.S.C. § 1811 *et seq*; see also *infra*.

> all accounts maintained for the benefit of the depositor, whether or not in the depositor's name. There is no exception based upon the identity of the person opening, or responsible for opening, the account. Indeed, even the possibility of a (much more plausible) exception based upon the identity of the person in whose *name* the account is held is explicitly precluded. [Emphasis by the Court.]

FAIC Securities, Inc. v. United States, 768 F.2d 352, 361 (D.C. Cir. 1985).

Likewise, within the Eighth Circuit it has been recognized that the substance of beneficial ownership is controlling:

> Both the applicable statutes and the FDIC's own regulations plainly suggest that, in some instances, *a party other than the one making an insured deposit may be treated as the owner of that deposit*. [Emphasis supplied.]

Anheuser-Busch Employees Credit Union v. FDIC, 651 F. Supp. 718, 722 (W.D. Mo. 1986), *aff'd* 837 F.2d 479 (8th Cir. 1987).

This emphasis is reflected in the FDIC's and FSLIC's own regulations, which specifically provide in numerous instances for the insurance of beneficiaries' interests in accounts held or created by others. *See, e.g.*, 12 C.F.R. §§ 564.2(b)(1) (1988) (trustee, agency, custodial arrangements); 564.3(b) (accounts held by agents or nominees – principal is insured); 564.4(a) (revocable trusts); 564.5 (accounts held by executors or administrators); 564.10 (trust estates) [FSLIC]; 12 C.F.R. §§ 330.1(b)(1) (1988) (trust, agency, custodial arrangements); 330.3 (testamentary accounts); and 330.101 (custodial accounts) [FDIC].

The Fifth Circuit has here painted with far too broad a brush. Misconstruing the "hard assets" reasoning of *Philadelphia Gear*, the Fifth Circuit has begun an erosion of the heretofore inviolate "beneficial owner" standard of

determining depositor status by basing it in significant part upon the *identity* of the person making the deposit rather than upon the *fact* of the deposit of "money or its equivalent." Unless restrained by a reaffirmation by this Court of the traditional principle that the "depositor" to be afforded federal protection is the actual, beneficial owner of the right insured, that erosion is certain to accelerate in the Fifth and other federal circuits in the face of governmental pleas for wide latitude and discretion in administering failed banks. Any real or perceived need for a stricter standard for a purely administrative advantage must remain secondary to the primary purpose of deposit insurance, which is protection of the actual owners of deposits, as further discussed *infra*. Where, as here, "the records of the institution show for whose benefit the account is maintained the legal measure of insurance protection for each cannot be withheld." *Banking Act: Hearings on H.R. 5357 Before the House Comm. on Banking and Currency*, 74th Cong., 1st Sess. 27, 128 (1935) (statement of FDIC general counsel L. E. Birdzell). To allow the Fifth Circuit's decision to remain undisturbed is to encourage the withholding of that protection from those beneficial owners who, like Petitioner, justifiably relied upon federal backing of their deposits, but nonetheless were deprived of that backing through no fault of their own.

II. A Federally-Insured Financial Institution May Not Deprive A Depositor Of The Benefits And Protections Afforded By The Federal System Of Deposit Insurance By (a) Intentionally Or Negligently Failing To Establish Or Document Properly The Deposit In Accordance With The Instructions Of The Depositor; Or (b) Unilaterally And Wrongfully Purporting To Offset The Deposit.

At its heart, the Fifth Circuit's decision below stands for the unprecedented proposition that once a deposit

relationship has been established, a financial institution may by its unilateral acts of omission or commission deprive the insured depositor of his status as such. In essence, the Fifth Circuit has held that a depositor who entrusts (or for whom are entrusted) hard assets to a federally-insured financial institution has the extraordinary burden of maintaining a continual vigilance of the bank's internal operations in order to ensure that his deposit is and remains properly documented. In so holding, the Fifth Circuit has inverted the deposit insurance scheme, since under its reasoning a depositor must depend for the ongoing insurance of his deposit not upon the solvency of the deposit insurance fund, but upon the competence and good faith of the institution where the deposit is held. To state the proposition is almost to refute it, for the federal backing of deposit liabilities clearly does not rely *upon* the insured institution; rather, it protects depositors *from* the institution. Nowhere in the statutory or regulatory schemes governing federal deposit insurance does the proposition suggested by the Fifth Circuit appear, yet it has in effect been made a rule of decision by that Court and will undoubtedly be so advanced by the banking agencies. As a rule of decision, it is antithetical to the language of the deposit insurance enactments, the underlying regulations, and even agency interpretation of those regulations. It is directly contrary to federal cases decided under strikingly similar circumstances during this country's last great banking crisis (and shortly after the creation of national deposit insurance), and stands squarely in opposition to the strong considerations of public policy which spawned the federal guarantee of bank deposits. The Fifth Circuit has, thus, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision to reaffirm the inviolate nature of the federal insurance compact between American insureds and their government, notwithstanding the

intervening wrongful acts or omissions of bank personnel.

A. The Applicable Statutes and Regulations Do Not Condition "Depositor" Status Upon The Conduct Of A Financial Institution.

First Texas was a state-chartered, FSLIC-insured savings and loan. As such, the National Housing Act ("NHA"), Pub. L. No. 73-479, 48 Stat. 1246 (1934), which created the FSLIC, was applicable at all relevant times[4] to the rights of its depositors. The NHA's insurance provisions were patterned after those of the Banking Act of 1933, 48 Stat. 168 (1933),[5] in which a nationwide system of deposit insurance for banks was first established. Courts have generally looked by analogy to the FDIA for guidance in interpreting the less artfully drafted NHA. *See, e.g., FAIC Securities, supra,* 768 F.2d at 363. The NHA provided in relevant part that "[The FSLIC] *shall* insure the accounts of institutions eligible for insurance," 12 U.S.C. § 1725(a); the FDIA similarly dictated that "[The FDIC] *shall* insure . . . the deposits of all banks which are entitled to the benefits of insurance . . . ," 12 U.S.C. § 1811. [Emphasis supplied.] Thus, insurance of all "accounts" or "deposits" at eligible institutions was mandated by the NHA and FDIA. Insurance for approved institutions was to be provided under the NHA "up to

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[4] The deposit insurance provisions of the NHA were repealed, and the FSLIC abolished, by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

[5] The deposit insurance program for banks was made permanent by the Banking Act of 1935, 49 Stat. 684 (1935). The Banking Acts of 1933 and 1935, originally part of the Federal Reserve Act, 38 Stat. 103 (1913), were reenacted and codified as the Federal Deposit Insurance Act ("FDIA"), Pub. L. No. 73-6, 64 Stat. 873, 12 U.S.C. § 1811, *et seq*, in 1950.

the full withdrawal or repurchasable value of the accounts of each of its members and investors . . . holding withdrawable or repurchasable shares, investment certificates, or deposits, in such institution . . . " 12 U.S.C. § 1728(a). An "insured member" was defined by the NHA as one who "holds an insured account," 12 U.S.C. § 1724(b); "insured account" meant, *inter alia*, a "deposit account of a type approved by the [FSLIC] which is held by an insured member in an insured institution and which is insured . . . " 12 U.S.C. § 1724(c). The circularity of these definitions notwithstanding, the NHA was unambiguous in its directive that upon default of an insured institution, the institution was to make "payment of each insured account in such insured institution . . . as soon as possible." 12 U.S.C. § 1728(b).

The FDIA contained generally parallel provisions, requiring "payment of the insured deposits in such bank . . . as soon as possible." 12 U.S.C. § 1821(f). The term "deposit" was given fuller definition in the FDIA as:

> the unpaid balance of money or its equivalent received or held by a bank in the usual course of business and for which it has given or *is obligated to give credit*, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar name, or a check or draft drawn against a deposit account and certified by the bank, or a letter of credit or a traveler's check on which the bank is primarily liable . . .

12 U.S.C. § 1813(l)(1). "Escrow funds" are specifically included within the FDIA's definition of "deposit." 12 U.S.C. § 1813(l)(3).

Unlike the typical modern insurance policy replete with carefully drawn descriptions of coverage, endorsements, exclusions, and exceptions, the NHA and FDIA contain no language remotely suggesting a Congressional

intention to limit the scope of the coverage provided to specific contingencies resulting in loss to depositors. Specifically, nowhere in either scheme is defalcation of the insured financial institution in establishing, documenting, or maintaining the deposit made an exception to the scope of federal deposit insurance. Nowhere is an exclusion found for deposit losses suffered as a result of a wrongful pre-insolvency offset. Clearly, had Congress desired to limit the availability of deposit insurance to specific types of losses, it could and would have done so.[6] Implicit in the absence of any such limiting language is the inference that Congress intended to provide the broadest possible coverage against loss, however caused. Any doubt in this regard is erased by a review of the legislative history, further discussed *infra*.

Likewise, the regulations adopted by the FSLIC and applicable upon the default of First Texas, primarily set forth in 12 C.F.R. Part 564 (1988), provide no support for the proposition that insured depositor status may be destroyed by the unilateral acts of the insured depository. The Fifth Circuit, however, attempted to extract such a meaning through a strained, if inventive, interpretation of two portions of the regulations. [*See* 963 F.2d at 83-84; Opinion, Appendix A at pp. 11a-12a]. For this purpose the FSLIC deposit insurance regulations are ill-suited. It is clear from the face of the regulations themselves that their function is to defeat multiple insurance claims in excess of the current $100,000 per depositor limitation; their Congressional champion explained to Congress that their purpose was to "prevent the circumvention of the

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[6] The Petitioner should not be understood to contend that federal deposit insurance is required to respond to depositors' losses, from whatever cause, prior to institutional insolvency. Until that time, all claims of loss must be directed to the institution, as was Petitioner's first recourse here. *See, e.g., Ehrlich v. FDIC*, 357 F. Supp. 196 (N.D. Ill. 1973).

insurance limit by the device of multiple accounts in the same institution," 112 Cong. Rec. 25,007 (1966). They were *not* intended to deprive the beneficial owners of deposits of the benefit of federal insurance of the obligations owed to them where an insured institution simply fails to document the deposit properly. Had such a rule of strict compliance been the intent, the regulations could have so provided; in fact, they do provide in relevant part that:

> If available evidence shows that ownership is different from that on the institution's records, the [FSLIC] may pay claims for insured accounts on the basis of actual rather than ostensible ownership.

12 C.F.R. § 564, Appendix (1988). This language has been interpreted by at least one Fifth Circuit panel "to permit proof that a federally insured bank did not follow the depositor's instructions as to the proper characterization of the account or ignored a request to correct such an error." *Abdulla Fouad & Sons v. FDIC*, 898 F.2d 482, 485 (5th Cir. 1990); *see also Jones v. FDIC*, 748 F.2d 1400 (10th Cir. 1984). Indeed, in a recent Advisory Opinion, the FDIC acknowledged that where the balance of an account as shown on the institution's books and records is less than it should be, due to negligence or willful wrongdoing on the part of bank employees, such wrongdoing will not prevent the depositor from recovering his full deposit:

> [M]oney belonging to a depositor that is tendered to, and received by, an insured institution for deposit, but that is not credited to the depositor's account, due to the negligence or willful wrongdoing of an employee of the institution, *should be treated as a deposit in fact*. Similarly, money belonging to a depositor that is so tendered and received and properly credited to the depositor's account, but that is improperly

> deducted from that account, due to the negligence or willful wrongdoing of an employee of the institution, *should be treated as remaining in the account*. [Emphasis supplied.]

Advisory Opinion 91-70, Fed. Banking L. Rep. (CCH) ¶ 81,448, August 8, 1991. [Reproduced in its entirey as Appendix G, begining at p. 60a, *infra*]. On the issue of the legal effect of an improper withdrawal from an account, and its impact upon the underlying deposit liability, the FDIC said:

> If the questioned withdrawal was, in fact, unauthorized and the savings and loan association was negligent in permitting it, *the association's deposit liability would not have been discharged and the withdrawn amount should still be considered to be part of the deposit*. [Emphasis supplied.]

This position is consistent with the District Court's opinion and the FDIC's stated philosophy that a bank's wrongdoing cannot deprive the owner of a deposit of its benefit:

> [I]f a depositor directs an insured institution to use particular language in setting up a deposit account on the institution's deposit account records . . . and the institution fails to use that particular language, *the FDIC would treat as done that which should have been done*. [Emphasis supplied.]

Advisory Opinion 90-44, Fed. Banking L. Rep. (CCH) ¶ 81,332, August 23, 1990.

B. The Public Policies Underlying Federal Deposit Insurance, As Reflected By The Legislative Histories Of The National Housing Act And Federal Deposit Insurance Act, Require Absolute Protection Of Depositors.

The Fifth Circuit's implicit decision that a "deposit" cannot be recognized where the account alleged to reflect

the deposit was wrongfully offset prior to the financial institution's insolvency is fundamentally at odds with the strong public policies underlying federal deposit insurance. Those policies have changed little since the federal insurance acts were passed in 1933 and 1934, *Philadelphia Gear, supra,* 476 U.S. at 433-34, and the legislative history of those enactments reflects a clear Congressional intent to afford the maximum possible coverage against loss of hard dollars on deposit at insured institutions, however caused. Indeed, the legislative history suggests that a *guarantee against loss,* rather than insurance in the traditional sense, was intended. Because Congress had only the year before debated and passed the Banking Act of 1933, creating national insurance of bank deposits, the legislative history behind the 1934 enactment of the NHA and its similar scheme for thrifts is limited. What history there is, however, reflects a desire by Congress to create a system protecting depositors against *all* losses. Said the House sponsor of the NHA, Rep. Steagall, Chairman of the House Banking and Currency Committee, in summarizing the insurance provisions:

> This Insurance Corporation is authorized to insure accounts not exceeding $2,500 in building-and-loan, savings-and-loan, and homestead associations, and cooperative banks, whether the same are members of a Federal home-loan bank or not. This insurance does not attempt to provide for the liquidity of these savings but *merely to provide that the saver will get his money back through the orderly processes of these associations; or in the event of liquidation, that this Insurance Corporation will pay the saver* 10 percent of his money in cash and 50 percent of the remainder in 1 year, and the balance in 3 years. [Emphasis supplied.]

78 Cong. Rec. 11,192 (1934).

The broad scope of national deposit insurance intended by Congress is made even clearer in the legislative history of the FDIA. Said the report of the House Committee on Banking and Currency on the bank bill:

> The bill makes provision for insuring deposits both in national and other member banks and in nonmember State banks, which it is believed will provide *absolute indemnity against loss for depositors in banks insured*. . . . It is submitted that the guarantee of bank deposits against loss provided by this bill is *absolute* and that no specific guarantee of the Government is necessary to make the protection of the depositors complete. [Emphasis supplied.]

H. Rep. No. 150, 73rd Cong., 1st Sess. 5 (1933). The House debate confirms the conclusion that the broadest possible guarantee was intended:

> The public does not understand these technical discussions, but from one end of this land to the other the people understand what we mean by guaranty of bank deposits, and they demand of you and me that we provide a banking system worthy of this great Nation and banks in which citizens may place fruits of their toil and know that a deposit slip in return for their hard earnings will be as safe as a Government bond.

78 Cong. Rec. 3840 (1933) (Remarks of Rep. Steagall). The record of the debates is replete with such references to the broad coverage to be afforded:

> Mr. Dunn. Does this bill in its present form give the depositors of the banks of the United States a bona fide guaranty that when they place their money in the bank it will be safe?
>
> Mr. Goldsborough. It does.

78 Cong. Rec. 3918 (1933). The legislative histories of the NHA and FDIA thus make pellucid the departure of the Fifth Circuit from the well-settled public policy that deposit insurance is to establish a system of guaranteeing

bank deposits against loss resulting from failure of the institution. It was intended as a bulwark against the conduct of unscrupulous or incompetent bankers, and not as a means of continuing a tradition of dependence upon them. The Fifth Circuit's decision stands for a proposition which is the antithesis of the driving force behind the creation of deposit insurance: an absolute guarantee that one placing money in a bank "can absolutely know that he will under *no circumstances* lose a single penny of it." 77 Cong. Rec. 3924 (1933) (remarks of Rep. Green). [Emphasis supplied.]

C. Federal Courts Have Resolved Identical Issues In Favor Of Preserving Depositor Status.

The precise issue of the survival of a deposit liability after insolvency of the depository has rarely been addressed by American courts. Interestingly, however, in *each* case found in which such issues were presented in the context of bank wrongdoing which called into question a depositor's status as such, the question was resolved in favor of the depositor. In a series of cases decided by federal courts at the end of the Depression, *each court* addressing the question of the impact of bank wrongdoing upon the existence of a deposit embraced the fundamental proposition rejected by the Fifth Circuit: that the chose in action of a deposit liability cannot be emasculated by the wrongful acts of the obligor, the performance of whose very duty is guaranteed by the government.

Of particular relevance here is *FDIC v. Records*, 34 F. Supp. 600 (W.D. Mo. 1940), in which the Blue Springs State Bank, like First Gibraltar here, had contractually agreed to assume the "liabilities to depositors" of two failed banks. When the Blue Springs State Bank itself failed, deposit claims were asserted against the FDIC for deposit liabilities of the prior banks as to which Blue

Springs had no record. Upon investigation, it appeared that the cashier of the failed banks had developed the habit of pocketing deposits and not entering them in the bank's ledger; the FDIC apparently contended there was thus no "deposit liability" assumed from the old banks (and passed to it) by Blue Springs because no deposit (or deposit records) existed. The Court found that each plaintiff:

> had a deposit in the 'old bank' when he handed his money to the cashier and received an entry in his passbook. He had then done all that it was possible for him to do. *From that moment he was a depositor, whether the ledger of the bank evidenced the fact or not, whether the officer of the bank embezzled the money or not.* [Emphasis supplied.]

Id. at 602. On the contractual assumption issue, the Court held:

> The Blue Springs State Bank assumed the liabilities of the 'old bank.' When that fact was agreed to . . . necessarily it was agreed that the liabilities, when assumed, should be of the same nature and character as the liabilities of the 'old bank.' The deposit liability of the 'old bank' to X became then a deposit liability of the Blue Springs State Bank to X.

Id. The Court concluded that "the liability of the Blue Springs State Bank to any depositor of the 'old bank' could not possibly be affected by the fact that the liability of the 'old bank' did not happen to be set up on the ledger of the 'old bank.' " *Id.*

On similar facts identical conclusions were reached by the courts in *Deaton v. FDIC*, 24 F. Supp. 984 (W.D. Okla. 1938) ("acts above mentioned constituted a deposit . . . immaterial what the bank did thereafter . . . "), *aff'd*, 105 F.2d 677 (10th Cir. 1939); *Barton v. Johnson*, 24 F. Supp. 987, 988 (W.D. Okla. 1938) ("if this were a completed transaction . . . no act of the bank would affect [depositor's] rights"), *aff'd, sub nom, FDIC v. Barton*, 106 F.2d 737

(10th Cir. 1939); *Jones v. FDIC*, 24 F. Supp. 985, 986-987 (W.D. Okla. 1938) ("little regard was shown for the rights of the depositors and the accounts were handled as the management of the bank saw proper . . . each of these plaintiffs did have a deposit . . . "); *Hockenjos v. FDIC*, 199 A. 596, 598 (N.J. 1938) ("wrongdoing of the officers of the insured bank is to the loss of the insurance corporation and not to the loss of the customer.")

The reasoning of these decisions is as sound today as it was at the time, based as it was on well-settled principles of law governing the intrinsic nature of deposit liabilities. Certiorari is proper to vacate the opinion of the Fifth Circuit which conflicts with these decisions, rendered by courts which were present in the infancy of federal deposit insurance. Certiorari is also appropriate to remove future uncertainty as to the insured status of depositors who fall victim to negligence or wrongdoing by their bankers resulting in the loss of their deposits, and, in some cases, the records reflecting them.

CONCLUSION

Taking their cue from this Court's decisions in *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), and *Langley v. FDIC*, 484 U.S. 86 (1987), the Federal Courts of Appeals have granted to the federal banking agencies extraordinary powers to resolve insolvent financial institutions. Nowhere has this deference been more pronounced than in the Fifth Circuit. The scope of these judicially-conferred powers might be thought necessary to protect the public interest insofar as their justification is the recovery of institutional assets from borrowers in default. Those who have obtained the benefits of bank deposits in the form of loans should, indeed, expect to repay them. However, as the decisions in this and similar cases telegraph, the Federal Courts of Appeals, and especially the Fifth Circuit, have turned the servant upon its

master; the "absolute indemnity against loss for banks insured" intended by Congress has now become contingent upon the proper bookkeeping and lawful conduct *of the depository*, subject to a federal post-default determination as to whether the alleged deposit was adequately documented. The banking crisis which has gripped this country since the 1980s is not the first such crisis, nor shall it be the last. It is, therefore, of importance that this high court, at this critical juncture, and with recent painful experience close at hand, reaffirm the principle of unconditional protection of depositors intended by Congress in adopting a scheme of national deposit insurance.

For the foregoing reasons, this Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

CITY OF ARLINGTON, TEXAS,
a Municipal Corporation,
Plaintiff-Appellee,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, etc.,
Defendants,

First Gibraltar Bank, FSB,
Defendant-Appellant.

No. 90-7090.

United States Court of Appeals,
Fifth Circuit.

June 17, 1992.

Appeals from the United States District Court For the Northern District of Texas.

Before POLITZ, Chief Judge, BROWN, Circuit Judge, and FELDMAN,* District Judge.

POLITZ, Chief Judge:

First Gibraltar Bank, NSB [sic], appeals a summary judgment ordering it to establish and fund an account in the amount of $2,100,000 plus interest in favor of the City of Arlington, Texas. Gibraltar also appeals the denial of its motion for summary judgment. For the reasons stated herein we reverse the summary judgment against Gibraltar and render summary judgment in its favor.

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* District Judge for the Eastern District of Louisiana, sitting by designation.

Background

In 1985 First Texas Savings Association, a state chartered savings and loan association, entered into a loan agreement with Shady Valley West Joint Venture,[1] agreeing to loan the venture up to $29,620,000 for acquisition and improvement of certain real property located in Arlington, Texas. First Texas required Shady Valley to post an irrevocable letter of credit in the amount of $4,100,000 to assure the availability of sufficient funds to construct Green Oaks Boulevard on the property. In June 1986 Shady Valley and First Texas entered into a letter agreement which modified the terms of the loan agreement to provide, *inter alia*, that First Texas would hold the sum of $2,300,000 "for the construction costs relating to Green Oaks Boulevard."

By agreement First Texas then made a $2,697,993.70 draw on the letter of credit. First Texas deposited that sum into an account styled "FTSA Tr for Shady Valley J.V."[2] (the "Account"). In September 1986 First Texas and Shady Valley modified the terms of the Account agreement to permit the withdrawal of all sums in excess of $2,100,000 on the condition that the remaining Account funds would secure payment of the loan. The modification agreement acknowledged that the amount remaining in the Account is "currently held by [First Texas] . . . as

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[1] A more complete recitation of the facts underlying the instant appeal are found in the district court decision. *City of Arlington v. Federal Deposit Ins. Corp.*, 752 F.Supp. 219 (N.D.Tex. 1990).

[2] First Texas Savings Association as Trustee for Shady Valley Joint Venture.

security." The modification agreement provided that if no default occurred under any of the loan documents, then the remaining amounts in the Account would be utilized to construct Green Oaks Boulevard. At or about the same time Shady Valley, First Texas, and Arlington entered into an escrow agreement which set forth the obligations with respect to the construction of Green Oaks Boulevard. This agreement was signed a few days after the execution of the modification agreement between Shady Valley and First Texas.[3] First Texas maintained the escrow agreement in its real estate loan files, not in its deposit records.

The instant controversy arises out of the provisions of the escrow- agreement which provided, in relevant part, that (1) upon execution of the escrow agreement First Texas would place the sum of $2,100,000 in a separate interest-bearing account designated as "Escrow Account-Arlington" to be used to complete the Green Oaks Boulevard project, and (2) if Shady Valley failed to commence construction of the project within one month, or failed to complete the project within 180 working days, Arlington had the option to hire a contractor to complete the project. After the escrow agreement was signed, a First Texas officer told the Arlington city attorney that the Arlington escrow account had been established, although in fact it had not been. Subsequently, Shady Valley defaulted on its loan obligations and in April 1987 First Texas closed the Account after offsetting its balance against Shady Valley's loan. When Arlington discovered

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[3] After signing the escrow agreement First Texas discovered that shortly before Arlington had paid Shady Valley $1,500,000 as a part of a "settlement agreement."

the offset the following month, it demanded that First Texas reinstate the Account. When First Texas refused, Arlington filed suit in state court alleging tort and breach of contract claims.

In December 1988, 20 months after the Account offset, the Federal Home Loan Bank Board declared First Texas to be insolvent and appointed the FSLIC as receiver. Thereafter, Gibraltar executed a purchase and assumption agreement with the FSLIC in which Gibraltar assumed certain First Texas assets and liabilities including liabilities to secured creditors, taxing authorities, and depositors. Gibraltar expressly assumed and agreed to pay, perform, and discharge all First Texas depositor liabilities as defined in the purchase and assumption agreement.

In January 1989 the FSLIC, in its capacity as receiver, intervened and removed the suit to federal court. In May 1989 Arlington added Gibraltar and the FSLIC, in its corporate capacity, as defendants. In May 1990 Gibraltar moved for summary judgment, urging that as a matter of law it had no liability to Arlington. In September, Arlington moved for summary judgment on the basis that Gibraltar had assumed the First Texas depositor liability to Arlington. The FDIC, in its receiver capacity and statutory successor to the FSLIC and Manager of the FSLIC Resolution Fund, likewise moved for summary judgment. Simultaneously the FDIC in its corporate capacity, as Manager of the FSLIC Resolution Fund and statutory successor to the FSLIC in its corporate capacity, also moved for summary judgment. The district court dismissed the FDIC-receiver with prejudice, granted summary judgment for Arlington, and denied summary

judgment for Gibraltar.[4] The judgment, in part, ordered that Gibraltar establish and fund an account in the amount of $2,100,000 plus interest in favor of Arlington. The district court then dismissed the FDIC/Manager-Fund with prejudice and Gibraltar filed a timely notice of appeal. The FDIC participates in this appeal as an *amicus curiae*.

Analysis

The standard of review for a summary judgment is well settled: We review the record *de novo* to ascertain whether any genuine issue exists as to any material fact and, if none exists, determine whether the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Miles v. American Tel. & Tel. Co.*, 703 F.2d 193 (5th Cir. 1983). Without weighing the evidence, assessing its probative value, or resolving any factual disputes, we search the record for resolution-determinative factual disputes and apply the law to the facts if no material disputes are found. *Kennett-Murray Corp. v. Bone*, 622 F.2d 887 (5th Cir. 1980). We review *de novo* district court conclusions of state law. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

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[4] The order also severed for separate trial "all claims and causes of action asserted by, and all relief sought by, plaintiff against FDIC/Manager-Fund and First Gibraltar that are not resolved by this opinion and order." The severance order was not appealed.

We must first determine whether Arlington was a depositor of First Texas whose liability Gibraltar subsequently assumed. The district court answered this question in the affirmative. In this the district court erred. The district court found that because First Texas had actual knowledge that the Account would be used by Arlington to pay the costs of the construction of Green Oaks Boulevard it had no right to offset the Account. *National Indemnity Co. v. Spring Branch State Bank*, 162 Tex. 521, 348 S.W.2d 528 (1961), and *South Central Livestock Dealers, Inc. v. Security State Bank of Hedley*, 551 F.2d 1346 (5th Cir. 1977), interpreting Texas law, are advanced in support of the trial court's decision. The district court concluded that "the bookkeeping offset of the Account [by First Texas] was a nullity as to City of Arlington."

National Indemnity and *South Central Livestock* stand for the proposition that if a bank offsets an account, the proceeds of which belong to a third person, whether the bank has knowledge of the third party ownership or not, the injured person has a cause of action in equity for wrongful offset and, in some cases, a cause of action for tortious interference with contract. The court did not order the bank to "recreate and refund" the alleged wrongfully offset account in either of these cases, nor did either court suggest that such a remedy existed. These cases merely recognized the plaintiff's right to pursue an equitable remedy. In *South Central Livestock* we noted that a "Texas bank's power to offset is equitable in nature, and it may be overborne by superior equities. . . . If this causes some inconvenience, it would still seem to us preferable to a rule which would require one man to pay

the debts of another without receiving any value therefor." *South Central Livestock*, 551 F.2d at 1351 (citation and internal punctuation omitted). The judgment before us turns the Texas equity principle on its head, occasioning the very result which equity abhors – one person [Gibraltar] is paying the debts of another [First Texas] without having received any value whatever.[5] We therefore conclude that these two cases provide no predicate for declaring Arlington a "depositor" of First Texas.[6]

The district court hedged its Texas law analysis with a string cite to four depression-era federal cases which purportedly stand for the proposition that a successor institution cannot avoid FDIC insurance liability when the predecessor institution's alleged wrongful acts caused the record of the depositor's account to be questioned. *Federal Deposit Ins. Corp. v. Barton*, 106 F.2d 737 (10th Cir. 1939); *Federal Deposit Ins. Corp. v. Deaton*, 105 F.2d 677 (10th Cir. 1939); *Federal Deposit Ins. Corp. v. Records*, 34 F.Supp. 600 (W.D.Mo. 1940); and *Jones v. Federal Deposit Ins. Corp.*, 24 F.Supp. 985 (W.D.Okla. 1938). These cases are inapposite. Each involves a suit against the FDIC for insurance payments and turn on factual circumstances in

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[5] It is undisputed that Gibraltar received no payments from FSLIC representing any money related to the disputed account. The district court recognized that the "FDIC/Manager-Fund now has ownership of the real property." *City of Arlington*, 752 F.Supp. at 228.

[6] Because the FSLIC's declaration of worthlessness of First Texas has gone unchallenged, Arlington's cause of action under *National Indemnity* and *South Central Livestock* may be valueless. *See Gulley v. Sunbelt Sav., F.S.B.*, 902 F.2d 348 (5th Cir. 1990). That question, however, is not before us today.

which an actual deposit of money was made to an account[7] and both the deposit and the account were clearly documented in the bank records. None of those factual circumstances exist in Arlington's claim nor is Arlington's claim one against the FDIC for account insurance.

Finally, the district court relied on FSLIC insurance settlement regulations for the proposition that a party, other than the one making an insured deposit, may be treated as the owner of that deposit. In *FAIC Securities, Inc. v. United States*, 595 F.Supp. 73 (D.D.C. 1984), the court ruled that where the records of the institution show for whose benefit the account is maintained, the insurance protection cannot be withheld. *FAIC* involved a challenge to FDIC regulations that would have limited insurance payments on brokered deposit accounts. In striking down the regulations, the *FAIC* court emphasized that the ultimate concern of the insurance regulations has always been to protect the beneficial owner of the funds on deposit *when* "the ownership is reflected on the books of the bank." *FAIC*, 595 F.Supp. at 77 (emphasis ours). "the command seems to be clear . . . where the records of the institution show for whose benefit the account is maintained the legal measure of insurance protection cannot be denied." *Id.* As we have stated previously, the instant case is not an FDIC insurance claim and

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[7] For a recent affirmation of the principle that the FDIC insurance legislation is intended to protect actual money or its equivalent deposited by the claimant *see Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986).

Arlington's ownership of the funds in the Account was never noted upon the deposit records of First Texas; thus, *FAIC* also in inapposite.

We now turn to the purchase and assumption agreement itself:

> Section 1(a) defines *Deposit* as "a withdrawable . . . share . . . or deposit in the CLOSED ASSOCIATION of a type that is . . . insurable under Section 405(a) of the National Housing Act (12 U.S.C. § 1728(a) (1982). . . . "
>
> Section 2 defines *Depositor* as "the holder of a Deposit in the CLOSED ASSOCIATION."
>
> Section 3 provides in relevant part that the "ACQUIRING ASSOCIATION hereby expressly assumes and agrees to pay, perform, and discharge (i) all of the CLOSED ASSOCIATION's liabilities to Depositors with respect to their Deposits. . . . "
>
> Section 5 provides in relevant part that "the RECEIVER shall furnish to the ACQUIRING ASSOCIATION upon its completion . . . a record of the CLOSED ASSOCIATION's . . . deposit . . . liabilities that were assumed in this Agreement."
>
> Section 7 provides that "[t]he ACQUIRING ASSOCIATION agrees to pay . . . all properly drawn and presented withdrawal requests by the CLOSED ASSOCIATION's Depositors whose Deposits are assumed by the ACQUIRING ASSOCIATION pursuant to § 3. . . . *provided*, however, that the ACQUIRING ASSOCIATION does not assume any special or unusual duties of the CLOSED ASSOCIATION to such Depositors unless the terms of such

> duties are disclosed in the CLOSED ASSOCIATION's records." [Emphasis ours.]

We note at the outset that the list of depositors which the RECEIVER ultimately presented to Gibraltar made no reference to the disputed Arlington Account.[8] That fact lends support to the conclusion that Arlington was not a depositor as that term is defined in the purchase and assumption agreement.

Arlington argues that the unambiguous meaning of sections 1, 3, and 7 of the purchase and assumption agreement is that Gibraltar assumed all First Texas' depositor liabilities without exception or qualification. Relying on its state-law-based claim that the offset, closing, and removal of the Account from the account records of First Texas could not alter its status as a depositor of First Texas, Arlington concludes that Gibraltar intended to and did, in fact, assume Arlington's depositor liability.

Taken to its logical conclusion, Arlington's theory would have Gibraltar assume liability for every depositor account transaction made by First Texas, including those which resulted in the closure and deactivation of deposit accounts. This ostensibly would reach back into the past, at least until the time of the Account offset and closure, 18 months or so prior to the purchase and assumption. Apparently Arlington considers the FSLIC inventory of deposit accounts provided to Gibraltar under the purchase and assumption agreement to be merely the baseline depositor liability that Gibraltar assumed; other

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[8] It is undisputed that the audit occurred after the execution of the assumption agreement.

"depositor" liabilities, such as Arlington's, would become exigible *seriatim* upon discovery. This interpretation of the agreement is contrary to the construction implicit in its performance by the FSLIC and Gibraltar, the parties thereto. We may give it little weight. *Mapco, Inc. v. Pioneer Corp.*, 615 F.2d 297 (5th Cir. 1980) (interpreting Texas law).

To fall within the liability purview of the purchase and assumption agreement Arlington must show that it was the holder of a First Texas deposit of a type that was insurable under Section 405(a) of the National Housing Act[9] at the time Gibraltar entered into the purchase and assumption agreement. Pursuant to its rulemaking powers, the FSLIC promulgated, at 12 C.F.R. Parts 561 and 563-564, rules which implement and define its statutory insurance obligations. The district court misapplied two related, but distinct regulations concerning insured deposit accounts. Section 564.1(a) provides that the "Corporation will promptly *determine,* from the account contracts and the books and records of the institution, or otherwise, *the insured members thereof.*" (Emphasis ours.) In the instant case the FSLIC inventory did not list Arlington as an insured member. There is no indication that Arlington challenged the inventory list.

The district court erred by employing section 564.2 to define the meaning of the phrase "from the account contracts and the books and records of the institution" as

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[9] 12 U.S.C. § 1728(a) (1982), repealed by Act Aug. 9, 1989, P.L. 101-73, Title 4, § 407, 103 Stat. 363.

employed in section 564.1.[10] Section 564.2 contains a set of interpretative rules that speak to determination of the actual owner of a section 564.1 "insured member" account. The "account records of the insured institution" are deemed conclusive evidence as to the existence of any relationship on which a claim for insurance may be predicated. 12 C.F.R. § 564.2(b)(1). Sections 564.1 and 564.2 distinguish between insured members and amount of insurance coverage. Section 564.1 provides for the determination of the insured members of an insured institution and the balance of the insured accounts. 12 C.F.R. § 564.2(a). Section 564.2 determines the amount of insurance coverage for a section 564.1 account. 12 C.F.R. § 564.2(a). Section 564.2 defines certain permissible account-holder relationships such as trust, agency, guardians, and the like to resolve the question of whether there is $100,000 in insurance coverage or multiples of $100,000 coverage. *FAIC, supra.* Section 564.2 definitions are not applicable to the issue of the existence of an insured account or insured member. We therefore conclude that as a matter of law Arlington was not a depositor within the meaning of the purchase and assumption agreement.

Finally, we note that the parties and the *amicus* debate vigorously whether an affirmance of the judgment below would require the FDIC to indemnify Gibraltar out of the FDIC insurance fund under a purported indemnification clause in the purchase and assumption agreement. Because that question is not before us in this appeal

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[10] Arlington offers no support for its implied proposition that section 564.1 "records" include First Texas' real estate loan records.

we neither consider it nor offer any opinion about its proper resolution.

For the reasons assigned, the summary judgment ordering Gibraltar to create and fund an account is REVERSED and summary judgment is RENDERED herein in favor of Gibraltar. This matter is REMANDED for further proceedings consistent herewith.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-7090

D.C. Docket No. CA4-89-073-A

CITY OF ARLINGTON, TEXAS,
A Municipal Corporation,

Plaintiff-Appellee,

versus

FEDERAL DEPOSIT
INSURANCE CORPORATION, Etc.,

Defendants,

FIRST GIBRALTAR BANK, FSB,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas

Before POLITZ, Chief Judge, BROWN, Circuit Judge, and FELDMAN,[1] District Judge.

JUDGMENT

(Filed June 17, 1992)

This cause came on to be heard on the record on appeal and was argued by counsel.

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[1] District Judge for the Eastern District of Louisiana, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause ordering Gibraltar to create and fund an account is reversed and summary judgment is rendered in favor of Gibraltar. The cause is remanded to the district court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

June 17, 1992

ISSUED AS MANDATE: JUL 27 1992

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-7090

CITY OF ARLINGTON, TEXAS,
A Municipal Corporation,

Plaintiff-Appellee,

versus

FEDERAL DEPOSIT INSURANCE
CORPORATION, Etc.,

Defendants,

FIRST GIBRALTAR BANK, FSB,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(Filed July 15, 1992)

Before POLITZ, Chief Judge, BROWN, Circuit Judge, and FELDMAN,* District Judge.

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* District Judge for the Eastern District of Louisiana, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
CHIEF JUDGE

CLERK'S NOTE:
SEE FRAP
AND LOCAL
RULES 41 FOR
STAY OF THE
MANDATE.

REHG-4

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CITY OF ARLINGTON, TEXAS, A MUNICIPAL CORPORATION	§	CIVIL ACTION NO.
VS.	§	CA4-89-073-A
FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND, STATUTORY SUCCESSOR TO THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST TEXAS SAVINGS ASSOCIATION, ET AL	§	(Filed Illegible)

MEMORANDUM OPINION

Came on for consideration the motions of defendants Federal Deposit Insurance Corporation, as Manager of the FSLIC Resolution Fund, statutory successor to the Federal Savings and Loan Insurance Corporation, in its corporate capacity, ("FDIC/Manager-Fund") and First Gibraltar Bank, FSB, ("First Gibraltar") for summary judgment and the cross-motion of plaintiff, City of Arlington, Texas, ("plaintiff") for summary judgment. These three are the only remaining parties to this action. For the reasons stated herein, the Court finds that First Gibraltar's motion should be denied, plaintiff's cross-motion should be granted in major part, and FDIC/Manager-Fund's motion should be granted in part.

History of Litigation

This action was commenced in state court as a suit by plaintiff against First Texas Savings Association ("First Texas") for relief based on allegations of impropriety on the part of First Texas in reference to an escrow account that existed at First Texas for the benefit of plaintiff. On December 27, 1988, First Texas was declared insolvent and Federal Savings and Loan Association ("FSLIC"), in its capacity as receiver for First Texas, removed the action to this Court.

By amended complaint, plaintiff named as additional defendants FSLIC, in its corporate capacity, and First Gibraltar, which had entered into an acquisition agreement in reference to First Texas with FSLIC, as receiver for First Texas. FSLIC, as receiver for First Texas, replaced First Texas as a defendant. By order signed in February 1990 Federal Deposit Insurance Corporation ("FDIC"), as manager of the FSLIC Resolution Fund, in its separate capacities as (1) statutory successor to FSLIC as receiver for First Texas and (2) statutory successor to FSLIC in its corporate capacity, was substituted for FSLIC, in its capacity as receiver for First Texas and in its corporate capacity, as a defendant. FDIC, as manager of the FSLIC Resolution Fund, as statutory successor to FSLIC as receiver for First Texas, was dismissed voluntarily by plaintiff. Each of the remaining parties has filed a motion for summary judgment, which will be discussed in more detail at a later point in this opinion.

Undisputed Facts

The summary judgment record, which includes open court admissions, establishes as undisputed facts that:

First Texas was a state chartered savings and loan association whose deposits were insured by FSLIC. On May 16, 1985, First Texas entered into a loan agreement with Shady Valley West Joint Venture ("Joint Venture"), pursuant to which First Texas agreed to loan up to $29,620,000.00 to Joint Venture for acquisition and development of certain real property located in Arlington, Tarrant County, Texas. *See* Ex. A to the affidavit of Denise Locascio ("Locascio Aff.")[1] In connection with the loan agreement, Joint Venture was required to post an irrevocable standby letter of credit in the amount of $4,100,000.00 "for the purpose of assuring First Texas that funds are and will be available for the construction of the said proposed Green Oaks Boulevard through the Property." Locascio Aff. Ex. D. The agreement relating to the letter of credit further provided:

> In any event, all proceeds derived by First Texas pursuant to the letter of credit shall be used solely for the construction through the property of the proposed Green Oaks Boulevard between Texas Spur 303 and West Division Street.

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[1] For convenience, the Court will, from time to time, refer to particular exhibits attached to the affidavit of Denise Locascio from which specific provisions may be quoted or otherwise referenced. The parties do not dispute that the exhibits are copies of operative documents regarding the loan and the account the subject of this action. The citation to a particular document does not mean that the Court bases any particular finding or conclusion solely on such document.

Locascio Aff. Ex. D. The letter of credit was amended several times to extend the maturity date.

On June 3, 1986, Joint Venture and First Texas entered into a letter agreement modifying the terms of the loan agreement to provide, among other things, that First Texas would hold the sum of $2,300,000.00 "for the construction costs relating to Green Oaks Boulevard . . . " Locascio Aff. Ex. H. First Texas submitted a draw request pursuant to the terms of the letter of credit and on June 6, 1986, a total of $2,697,993.70 was wired to First Texas. Locascio Aff. Ex. K. Said sum was deposited in First Texas Money Maker Plus Account No. 30-891-665-3 ("the Account"). The Account was styled "FTSA Tr for Shady Valley J.V.," which stood for "First Texas Savings Association as Trustee for Shady Valley Joint Venture." Pursuant to the terms of the June 3 agreement, the Account was reduced by the sum of $297,993.70.

Subsequently, Joint Venture requested that the Account be used to pay monthly interest due on the loan. The request was denied "with the understanding that after the completion of Green Oaks Boulevard all moneys remaining in said account will be returned," once again referencing the specific purpose for which funds had been deposited into the Account. Locascio Aff. Ex. O.

On or about September 26, 1986, First Texas and Joint Venture entered into a modification agreement, which purported to authorize withdrawal of all sums in excess of $2,100,000.00 out of the Account (which was erroneously referred to as "Certificate of Deposit No. 308916653") and to provide that the funds remaining in

the Account would secure payment of the loan. The modification stated:

> Provided there is no event of default under any of the loan documents, the remaining amount in Certificate of Deposit No. 308916653 shall be utilized to construct Green Oaks Boulevard and the bridge in accordance with the prior agreement between borrower and lender.

Locascio Aff. Ex. P.

At or about the same time, Joint Venture, First Texas, and plaintiff entered into an escrow agreement ("escrow agreement") setting forth the obligations of the parties with respect to the construction of a part of Green Oaks Boulevard. It was dated September 24, 1986, signed on behalf of Joint Venture shortly thereafter, and accepted by signatures on behalf of First Texas and plaintiff, respectively, on September 29, 1986, after the execution of the above-referenced modification agreement. Locascio Aff. Ex. Q. The controversy centers around the escrow agreement.

First Texas kept and maintained a copy of the escrow agreement in its records. Locascio Aff. page 7. It said that plaintiff was requiring the sum of $2,100,000.00 to be "escrowed to complete the construction of a portion of Green Oaks Boulevard from Spur 303 to Orion Parkway . . . " (which was referred to in the letter agreement by the word of art "work".) Locascio Aff. Ex. Q. The escrow agreement defined the rights of parties to the escrowed funds as follows:

> Accordingly consideration of mutual covenants and obligations herein set forth, the City, The

Venture and First Texas hereby agree and obligate themselves as follows:

1. Upon the execution hereof by all the parties, First Texas agrees to place the sum of Two Million One Hundred Thousand and No/100 Dollars ($2,100,000.00) in a separate interest bearing account designated "Escrow Account-Arlington" *to be utilized for the completion of the Work;* provided, however, it is expressly agreed and understood that First Texas, unless prohibited by the City in writing (which writing shall not be given without just cause) shall fund invoices for progress payments submitted to First Texas in respect of the Work.

. . . .

3. If and only if the Venture fails or refuses to commence construction of the Work within one month of the execution hereof, or Venture fails or refuses to complete and gain the City's acceptance of the Work on or before one hundred eighty working days, *the City may,* but shall never be required to, *complete the Work by hiring a private contractor and having such contractor submit invoices to First Texas; such invoices shall be paid to the private contractor by First Texas out of the escrow account.* (emphasis added)

Locascio Aff. Ex. Q, pages 1-2.

The intent of the parties was that the Account would be the "Escrow Account-Arlington" that was contemplated by the escrow agreement; and, once the agreement

was made, the parties considered that the Account was the "Escrow Account-Arlington." First Gibraltar's second supplemental interrogatory answers, Ans. 17. In other words, the placement by First Texas of $2,100,000.00 in a separate account was accomplished by allowing the Account to remain in existence at First Texas, and all parties viewed the account to be the "Escrow Account-Arlington," and as satisfying the requirements of the escrow agreement that First Texas place the sum of $2,100,000.00 in a separate account bearing the account designation "Escrow Account-Arlington." The failure to change the account name to "Escrow Account-Arlington was the result of neglect on the part of First Texas. First Texas records always showed the true nature of the Account and plaintiff's beneficial interest in the Account. At or about the time plaintiff executed the escrow agreement, an officer of First Texas told the attorney for plaintiff that the account contemplated by the escrow agreement was established. Doegey Aff., p. 2.[2]

Joint Venture defaulted on its loan agreement with First Texas; and, on April 16, 1987, First Texas showed on its records that it was offsetting the Account (which, at that time, contained the sum of $2,537,956.60) against the indebtedness owed by Joint Venture. Plaintiff subsequently discovered the April 16, 1987, offset entry, and, by letter dated May 7, 1987, plaintiff made demand on First Texas to reinstate the Account. When First Texas failed to comply with the demand, plaintiff filed the state court action against First Texas on or about May 27, 1987.

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[2] The facts stated in this paragraph found confirmation in admissions made by the parties at November, 1990, hearings.

On December 27, 1988, the Federal Home Loan Bank Board declared First Texas insolvent and appointed the FSLIC as receiver. Thereafter, by agreement ("acquistion agreement") with FSLIC as Receiver for First Texas ("FSLIC/Receiver"), First Gibraltar assumed certain of First Texas' assets and its liabilities to secured creditors, taxing authorities *and depositors*. The real property acquired with the funding provided pursuant to the loan agreement and across which a portion of Green Oaks Boulevard was to be constructed was transferred from First Texas, which had acquired the property through foreclosure, to the predecessor of defendant FDIC/Manager-Fund.

By the terms of the First Gibraltar-FSLIC/Receiver acquisition agreement, First Gibraltar expressly assumed and agreed to pay, perform and discharge all of First Texas' liabilities to depositors with respect to their deposits. Hurst Aff. Ex. B. As First Gibraltar admitted in response to a request for admission, the effect of the acquisition agreement was to cause First Gibraltar "to assume the liabilities of First Texas to its Depositors with respect to their deposits." First Gibraltar's Response to First Request for Adm., Resp. 6. The word "deposit" was defined as "a withdrawable or repurchasable share, investment certificate, or deposit in [First Texas] of a type that is (or would be but for the $100,000 limitation) insurable under Section 405(a) of the National Housing Act [12 U.S.C. §1728(a)(1982)] . . . "[3] The term "depositor" was

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[3] Although Section 1728 and other deposit insurance provisions of the National Housing Act were repealed by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

defined as the holder of a deposit in First Texas. The Account was a type of account approved for deposit insurance by the FSLIC, i.e. an account insurable under 12 U.S.C. §1728(a).

Joint Venture did not commence construction of the Boulevard mentioned in the escrow agreement, nor has plaintiff commenced the work. Plaintiff could commence the construction work within six months, and complete it within two years, after the funds in issue are made available.

The Summary Judgment Motions

The motion for summary judgment of First Gibraltar urges two grounds, first, that plaintiff's claims are simply general unsecured claims against the receivership estate of First Texas, that did not "pass through" the First Texas receivership to First Gibraltar, and, second, that the assets at issue (having reference to the land that secured the loan of First Texas to Joint Venture) in this action, and which relate to the escrow dispute, are now owned by FDIC in its corporate capacity and have never been owned by First Gibraltar. First Gibraltar acknowledges in its motion that it entered into the acquisition agreement but denies that it incurred any liability to plaintiff by reason of having done so.

When plaintiff responded to First Gibraltar's motion, it countered with a motion for summary judgment of its

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(FIRREA), Pub. L. No. 101-73, 103 Stat. 183, the parties do not dispute that the laws in effect at the time of the First Texas takedown apply to the resolution of this action.

own. The central points of plaintiff's motion are that First Texas entered into the escrow agreement, that an officer of First Texas confirmed to plaintiff that the account contemplated by the escrow agreement had been established, that pursuant to the escrow agreement First Texas was to hold on deposit the sum of $2,100,000.00 in a separate interest-bearing account to be designated "Escrow Account-Arlington," that the funds so maintained were for the benefit of the plaintiff and were to be utilized to finance the construction of a portion of Green Oaks Boulevard, that First Texas offset the deposit, and that, notwithstanding plaintiff's request that it do so, First Texas refused to restore the deposit. Plaintiff urges in its motion that, from these facts, the conclusion should be reached that, by reason of the obligations undertaken by First Gibraltar under the acquisition agreement, First Gibraltar assumed depositor liability to plaintiff with respect to the deposit in question.

FDIC/Manager-Fund's motion for summary judgment asserts reliance on an order the Court signed on March 20, 1990, by which the Court granted certain relief to FSLIC in its capacity as receiver in response to its motion, made in such capacity, to dismiss.[4] The motion of

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[4] The thrust of the order upon which FDIC/Manager-Fund relies is that plaintiff's claims against FSLIC-receiver (and FDIC in its successor capacity as receiver) for breach of contract and for conversion (plaintiff's unsecured claims) should be dismissed because FSLIC-receiver (and FDIC as successor receiver) no longer retains any assets of the failed First Texas, with the consequence that there are no assets against which any judgment obtained by plaintiff against FSLIC-receiver (or FDIC in its successor receivership capacity) could be satisfied.

FDIC/Manager-Fund goes on to assert that plaintiff's claims are potential liabilities of FDIC-receiver and cannot be asserted against FDIC/Manager-Fund.

Plaintiff responded to FDIC/Manager-Fund's motion, as it had First Gibraltar's motion; and, First Gibraltar and FDIC/Manager-Fund both responded to plaintiff's motion.

Proceedings Related to Motion for Summary Judgment, and Pretrial Order

At two hearings, one held November 1, 1990, and the other November 5, 1990, the Court took up with the parties the pending motions for summary judgment and the matter of definition of facts that are genuinely in dispute. At each of those hearings admissions were made that the Court has taken into account in identifying undisputed facts. Also, the Court has considered the pre-trial order filed October 4, 1990, in determining existence of facts that are not genuinely in dispute, though the Court is not allowing the pre-trial order to expand the summary judgment issues beyond those raised by the summary judgment responses, when considered together with authorized summary judgment evidence.

Conclusions from Undisputed Facts

A. First Gibraltar's Liability to Plaintiff as a "Depositor":

From the evidence contained in the record, there can be no doubt that First Texas agreed and understood, from the inception of the Account, that the Account would be

used to pay costs of the construction of Green Oaks Boulevard. Because First Texas had actual knowledge, being a party to the escrow agreement, that the funds in the account were held for a particular purpose and for the benefit of plaintiff, First Texas did not have the right as against plaintiff to offset the Account against the debt of Joint Venture. *South Central Livestock Dealers, Inc. v. Security State Bank of Hedley,* 551 F.2d 1346, 1349 (5th Cir. 1977); *National Indemnity Company v. Spring Branch State Bank,*162 Tex. 521, 348 S.W.2d 528, 529 (1961). Therefore, the bookkeeping offset of the Account was a nullity as to City of Arlington.

The defendants make much of the fact that the wrongful offset transaction occurred approximately twenty months prior to the takedown of First Texas. The timing of the offset transaction is not the issue, however. The real question is whether an institution can, by unilateral wrongful act, transform an insured account liability into a nullity, leaving the depositor with a general unsecured claim. The law is clear that the wrongful acts of a failed institution do not absolve the institution's successor from liability for insured deposits. *FDIC v. Barton,* 106 F.2d 737, 738 (10th Cir. 1939); *FDIC v. Deaton,* 105 F.2d 677, 679 (10th Cir. 1939); *FDIC v. Records,* 34 F. Supp. 600, 602 (W.D. Mo. 1949); *Jones v. FDIC,* 24 F.Supp. 985, 986 (W.D. Okla. 1938). The fact that the FDIC chooses to structure its takeovers in a different manner than occurred forty years ago does not affect the validity of the holdings in the above-cited cases.

The Court concludes that plaintiff was a depositor of First Texas at the time First Texas was declared to be insolvent, entitled to the benefit of deposit insurance. As

stated in *F.A.I.C. Securities, Inc. v. United States*, 595 F.Supp. 73, 77 (D.D.C. 1984), *aff'd*, 753 F.2d 166 (D.C. Cir. 1985), where the records of the institution show for whose benefit the account is maintained, the legal measure of insurance protection cannot be withheld. Further, the FDIC's own regulations reflect that a party other than the one making an insured deposit may be treated as the owner of that deposit. *Anheuser-Busch Employees Credit Union v. FDIC*, 651 F.Supp. 718, 722 (W.D. Mo. 1986), *aff'd*, 837 F.2d 479 (8th Cir. 1987).

The settlement of insurance regulations at 12 C.F.R. 564.1-.11 (1988) cited by defendants, and referred to by plaintiff as the "multiple coverage regulations," apply upon liquidation and payout of insurance when an institution fails. These regulations apply in situations where multiple beneficial owners allege an interest in a particular account or allege ownership interests in different capacities, most often in an attempt to recover more than $100,000.00 in insurance proceeds. Such is not the situation in this case.

Even if the settlement of insurance regulations do apply, these regulations support the Court's determination that plaintiff is entitled to judgment in this case. 12 C.F.R. § 564.1(a) provides that in the event of default by an insured institution the insured members thereof and the amount of the insured accounts of each such member shall be determined from the account contracts and books and records of the institution. Further, pursuant to 12 C.F.R. §564.2(b)(1), the account records are used to determine the existence of trusts or other fiduciary relationships. If the existence of a trust or fiduciary relationship is reflected in the account records then "the details of the

relationship and the interests of other parties in the account must be ascertainable either from the records of the association or the records of the account holder maintained in good faith and in the regular course of business." 12 C.F.R. §564.2(b)(2) (1988).

Here, the summary judgment proof establishes conclusively that First Texas' records maintained in the ordinary course of business disclosed that the funds in the Account were held in trust for the benefit of plaintiff and were to be used for the construction of Green Oaks Boulevard. But for the neglect of First Texas, the name of the account itself would have flagged the escrow nature of the Account and plaintiff's interest in it. The parties have agreed and stipulated that, because First Texas was not liquidated, the $100,000.00 limit on deposit insurance is not applicable. Rather, First Gibraltar has assumed liability to all First Texas depositors for the full amount of First Texas' depositor liability. As noted above, First Texas' depositor liability to plaintiff is not diminished by wrongful conduct or neglect on the part of First Texas. The law deems that the status of the Account on December 27, 1988, when First Texas was declared insolvent, was exactly as it would have been if First Texas had not neglected to properly designate the Account and wrongfully shown on its records that the Account was offset. The depositor liability in reference to such an account is liability First Gibraltar assumed by the acquisition agreement.

B. First Gibraltar's Defensive Contentions:

The basic defensive contention of First Gibraltar, as urged in its motion for summary judgment, is that plaintiff's claims are general unsecured claims and did not "pass through" to First Gibraltar via the acquisition agreement. For the reasons given above, this contention is unsound unless one of the avoidance-type contentions urged by First Gibraltar has merit. The Court now turns to a consideration of those contentions:

1. The ground of First Gibraltar's motion for summary judgment that it should be given judgment because "[t]he assets [the land that secured the loan of First Texas to Joint Venture] at issue in this case and which relate to the escrow dispute . . . are now owned by the Federal Deposit Insurance Corporation in its corporate capacity" and that "[t]hese assets are not now and never have been owned by First Gibraltar" is unsupported by any authority. It is without merit. The ownership status of the land has no relevance to the issue of depositor liability of First Gibraltar to plaintiff. Plaintiff's depositor liability claim against First Gibraltar is not contingent in any respect on legal or equitable ownership by First Gibraltar of the land.

2. In its response to plaintiff's cross-motion, First Gibraltar urges that plaintiff's failure to inform First Texas of an element of a settlement agreement reached in September 1986 between plaintiff and Joint Venture pursuant to which plaintiff agreed to, and did, pay Joint Venture the sum of $1,500,000.00 adversely affects, by way of estoppel, the rights of plaintiff under the escrow agreement. This contention is without merit. Plaintiff had

no obligation to inform First Texas of its agreement to pay Joint Venture $1,500,000.00 as part of an overall settlement between plaintiff and Joint Venture, nor did it have any obligation to inform First Texas that it had made such a payment.

3. First Gibraltar's response to the cross-motion makes a point of the fact that none of plaintiff's money was deposited into the Account and that, therefore, plaintiff does not qualify as a "depositor" whose depositor liabilities" were assured by First Gibraltar pursuant to the Acquisition Agreement. The Court already has explained in earlier part of this opinion why plaintiff qualifies as a "depositor" to whom First Texas had, and First Gibraltar now has, depositor liability.

4. First Gibraltar places reliance in its response on the order the Court signed March 20, 1990, which has been previously mentioned in this opinion, by which the Court dismissed (1) the damage claims of plaintiff against FSLIC in its capacity as receiver, (and FDIC, in its successor capacity as receiver) based on breach of contract and conversion and (2) plaintiff's request for imposition of a constructive trust as against that party in such capacity. In the Court's opinion, the March 20, 1990, order is not pertinent to the depositor liability claims of plaintiff. However, so that there will be no uncertainty on the subject, the Court hereby sets aside and modifies the March 20, 1990, order to whatever extent it is inconsistent with rulings made by the Court in this opinion or the order to be entered on the pending motions for summary judgment, as contemplated by this opinion. The Court adds that the March 20, 1990, order obviously was never intended to resolve in any respect any of the issues that

are being dealt with in this opinion and the order this opinion contemplates.

5. First Gibraltar argues that First Texas' offset of the Account was lawful because the September 26, 1986, modification agreement between First Texas and Joint Venture gave First Texas the right to make the offset. This contention entirely overlooks the fact that plaintiff was not a party to the modification agreement upon which First Gibraltar relies for justification for the offset, while, on the other hand, plaintiff, First Texas and Joint Venture all were parties to the escrow agreement. Quite obviously the tri-party agreement to which plaintiff and First Texas both were parties will prevail, as between them, over the modification agreement, to which plaintiff was not a party, to the extent that there is any inconsistency between the two. The escrow agreement provides, without qualification, that the funds to be contained in the escrow account are to be available for use by the plaintiff in completing the Boulevard construction work. This unqualified right given to plaintiff by the escrow agreement overrides any security interest or other right First Texas might have acquired in the Account as against Joint Venture by virtue of the modification agreement. *See South Central Stock Dealers, Inc. v. Security State Bank of Hendley, supra,* and *National Indemnity Company v. Spring Branch State Bank, supra.*

6. Though not raised, as required by the Local Rules, by First Gibraltar in its response to plaintiff's cross-motion, First Gibraltar is now urging by argument that plaintiff lost its rights under the escrow agreement, and to the Account, because Joint Venture did not move within the time limits specified in the escrow agreement

to commence and complete the Boulevard work and because plaintiff did not move with reasonable dispatch to cause the work to be done once Joint Venture failed to commence it. Obviously, plaintiff cannot be penalized by Joint Venture's delinquency. Plaintiff's rights under the escrow agreement were not dependent in any respect on performance of the Boulevard work by Joint Venture within the time frame specified in the agreement.

The only evidence on "timing" from the standpoint of plaintiff is the summary judgment evidence that approximately six months would be required for the City to complete its bid process preparatory to commencement of the work and that approximately two years would be required for completion of the work, all after availability of funds is assured. Hasler Aff., pages 2-3. In this instance, First Texas' conduct, which occurred only approximately six months after the escrow agreement was made, caused the funds to be unavailable. As a matter of law, plaintiff's failure to commence the work prior to the wrongful "offset" cannot be considered to be an unreasonable delay; and, the knowledge by plaintiff after the "offset" occurred that the funds would not be available constitutes full justification for any delay thereafter occurring.

The Court is discussing this contention for the purpose of showing its lack of merit without expressing approval of First Gibraltar's reliance on a ground in opposition to plaintiff's cross-motion that was not properly assigned in First Gibraltar's response.

7. In a supplemental brief filed by First Gibraltar on November 8, 1990, in support of its motion for summary

judgment and in opposition to plaintiff's cross-motion, First Gibraltar makes a number of other defense contentions that were not raised in First Gibraltar's response to plaintiff's cross-motion and were not set forth in the pretrial order. These new contentions include claims of legal unenforceability of the escrow agreement because of lack of meeting of the minds, lack of consideration, lack of essential elements, procurement by misrepresentation and fraud, non-approval of the agreement by the Board of Directors of First Texas or its loan committee, and the fact that the escrow agreement was maintained in the credit files of First Texas and was not, according to the contentions, a part of the officially recorded bank documents such as the note, deed of trust and modification agreement. First Gibraltar failed to properly present any of these contentions for consideration by the Court in connection with the pending motions for summary judgment. Therefore, they are rejected. However, the Court has studied the contentions and has noted that none of them has merit in any event.

C. Relief to be Granted Plaintiff Against First Gibraltar:

Though an actual damage award to plaintiff against First Gibraltar because of the latter's failure to honor its depositor liability to plaintiff could well be established by proof outside the summary judgment record, the Court has concluded that the form of relief that would be a more appropriate response to plaintiff's escrow agreement rights would be to require First Gibraltar to honor, in literal terms, the depositor liability First Texas had,

and First Gibraltar assumed, to plaintiff. The summary judgment record supports grant of such relief at this time. It can be afforded by an order directing First Gibraltar to establish and fund (or recognize) an account on its books that will give plaintiff the very things to which it is entitled under the escrow agreement. An award to plaintiff of anything less than that would be inequitable.

Reasonably read, the escrow agreement contemplates that plaintiff is to enjoy the benefit of earned interest as well as principal existing from time to time in the "Escrow Account-Arlington." Thus, the Court is ordering First Gibraltar to include in the account it is to establish (or recognize) pursuant to the rulings of the Court an appropriate interest accrual on $2,100,000.00 from September 29, 1986, to the present and to cause the account to bear interest at an appropriate rate in the future. Past interest will be at the rate of six percent (6%) per annum, bearing in mind the stipulation of the parties that the Account earned, or would have earned, at 6% simple interest per annum from September 29, 1986, through December 27, 1988. Presumably it earned, or would have continued to earn, interest at at least that rate through the present. Future interest accrual will be at the same rate normally applicable to an account similar to the Account.

D. The Claims of Plaintiff Against FDIC/Manager-Fund and Other Unresolved Claims:

By Count 6 of plaintiff's complaint, as amended, plaintiff seeks an adjudication that plaintiff has an equitable lien on the real property that is the subject matter of the loan agreement between Joint Venture and First

Texas; and, by Count 7 of the complaint plaintiff seeks imposition of a constructive trust on such real property. FDIC/Manager-Fund now has ownership of the real property. The Court has concluded that plaintiff's equitable lien and constructive trust theories are without merit, and that FDIC/Manager-Fund's motion for summary judgment should be granted as to those phases of plaintiff's case. The Court does not consider that the other grounds of recovery urged by plaintiff against FDIC/Manager-Fund should be resolved by summary judgment ruling; but, in view of the relief the Court is granting plaintiff against First Gibraltar, the Court has concluded that a severance and separate trial should be ordered as to all remaining claims of plaintiff against FDIC/Manager-Fund as well as all claims of plaintiff against First Gibraltar that are not resolved by rulings in this opinion and entry of order pursuant to this opinion.

Order to be Entered

For the reasons stated in this opinion, the Court rules, and a separate order ("the order") will be entered formalizing the rulings, that:

1. The motion for summary judgment of First Gibraltar is denied.

2. The motion for summary judgment of FDIC/Manager-Fund is granted as to the relief sought in Counts 6 and 7 of plaintiff's complaint, as amended; and, the requests by plaintiff for imposition of a constructive trust on, or equitable lien against, the real property that is the subject matter of the loan agreement between Joint Venture and First Texas are denied.

3. Plaintiff's motion for summary judgment is granted to the extent set forth in this opinion. In order to satisfy First Gibraltar's depositor liability to plaintiff, the Court is ordering that:

On or before December 21, 1990, First Gibraltar shall establish and fund at First Gibraltar an account in the amount of TWO MILLION ONE HUNDRED THOUSAND DOLLARS ($2,100,000.00), plus interest at six percent (6%) per annum on $2,100,000.00 from September 29, 1986, through the date when such account is established and funded. Such account shall be an interest bearing account that has withdrawal and interest earning attributes as similar as possible to the Account. First Gibraltar's account records, and the signature card on such account, shall show that First Gibraltar is trustee of the account for the benefit of plaintiff, subject to the terms of the order. The account records and signature card with respect to such account shall identify the order by reference to the style and cause number of this action and the date of the order. First Gibraltar, through its attorneys, shall promptly furnish to plaintiff, through its attorneys, a copy of the signature card for such account; and, First Gibraltar shall furnish to plaintiff, attention "City Attorney of Arlington," on a periodic basis, not less than once every three months, a statement of such account.

The purpose of the funds in such account, including any interest that accrues in the future on such account, is to pay for the construction of the portion of Green Oaks Boulevard in Arlington, Texas, from Spur 303 to Orion Parkway (the "Work"). Plaintiff may hire a private contractor to perform the Work once First Gibraltar has established and funded such account, or before that time

if it chooses. Plaintiff shall approve or disapprove the contractor's invoices or draw requests and submit the approved invoices or draw requests to First Gibraltar for payment out of the funds in such account. First Gibraltar shall pay out of such account those draw requests or invoices directly to the contractor within ten (10) days of receipt, with simultaneous notification to plaintiff of payment. First Gibraltar shall have no obligation to pay any sums in excess of the amount in such account plus accrued interest. Upon completion and acceptance by plaintiff of the Work and final payment to the contractor, any funds remaining in such account shall be retained by and belong to First Gibraltar. If completion and acceptance by plaintiff of the Work and final payment to the contractor does not occur within two years from the date First Gibraltar establishes and funds such account, First Gibraltar may apply to this Court for an order allowing First Gibraltar to withdraw and keep as its own any remaining funds in the Account.

4. Costs of court are taxed against First Gibraltar.

5. A severance is ordered, and a separate trial is to be held, with respect to all claims and causes of action asserted by, and all relief sought by, plaintiff against FDIC/Manager-Fund and First Gibraltar that are not resolved by rulings in this opinion and the order.

6. The Court directs entry of final judgment as to all claims and causes of action that are resolved by the rulings in paragraphs 1, 2, 3 and 4 above. The Court expressly determines that there is no just reason for delay in entry of final judgment as to such claims and causes of

action, and the Court is expressly directing entry of final judgment as to all such claims and causes of action.

SIGNED this 19th day of November, 1990.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CITY OF ARLINGTON, TEXAS, A MUNICIPAL CORPORATION	§	CIVIL ACTION NO.
VS.	§	CA4-89-073-A
FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND, STATUTORY SUCCESSOR TO THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIRST TEXAS SAVINGS ASSOCIATION, ET AL	§	(Filed ___ 9, 1990)

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The Court has considered and made rulings by memorandum opinion bearing the same date as this order on the motions of defendants Federal Deposit Insurance Corporation, as Manager of the FSLIC Resolution Fund, statutory successor to the Federal Savings and Loan Insurance Corporation, in its corporate capacity, ("FDIC/Manager-Fund") and First Gibraltar Bank, FSB, ("First Gibraltar") for summary judgment and the cross-motion of plaintiff, City of Arlington, Texas, ("plaintiff") for summary judgment. For the reasons stated in such memorandum opinion, the Court hereby ORDERS, ADJUDGES and DECREES that:

A. The motion for summary judgment of First Gibraltar should be, and is hereby, denied.

B. The motion for summary judgment of FDIC/Manager-Fund should be, and is hereby, granted as to the relief sought by plaintiff in Counts 6 and 7 of plaintiff's complaint, as amended. The requests by plaintiff for imposition of a constructive trust on, or of an equitable lien against, the real property that is described in Exhibit "A" to the deed of trust, dated May 16, 1985, given by Shady Valley West Joint Venture, Grantor, to First Texas Service Corporation, Trustee, which is recorded at Volume 8186, pages 2215-2227, Property Records, Tarrant County, Texas, should be, and is hereby, denied. The title to such real property should be, and is hereby, cleared of any claim by plaintiff in or against such real property.

C. Plaintiff's motion for summary judgment should be, and is hereby, granted to the extent set forth in this section C of this order:

> On or before December 21, 1990, First Gibraltar shall establish and fund at First Gibraltar an account in the amount of TWO MILLION ONE HUNDRED THOUSAND DOLLARS ($2,100,000.00), plus interest at six percent (6%) per annum on $2,100,000.00 from September 29, 1986, through the date when such account is established and funded. Such account shall be an interest bearing account that has withdrawal and interest earning attributes as similar as possible to the account that existed at First Texas Savings Association as account No. 30-891-665-3. First Gibraltar's account records, and the signature card on such account, shall show that First Gibraltar is trustee of the account for the benefit of plaintiff, subject to the terms of this order. The account records and signature card with respect to such account shall

identify this order by reference to the style and cause number of this action and the date of this order. First Gibraltar, through its attorneys, shall promptly furnish to plaintiff, through its attorneys, a copy of the signature card for such account; and, First Gibraltar shall furnish to plaintiff, attention "City Attorney of Arlington," on a periodic basis, not less than once every three months, a statement of such account.

The purpose of the funds in such account, including any interest that accrues in the future on such account, is to pay for the construction of the portion of Green Oaks Boulevard in Arlington, Texas, from Spur 303 to Orion Parkway (the "Work"). Plaintiff may hire a private contractor to perform the Work once First Gibraltar has established and funded such account, or before that time if it chooses. Plaintiff shall approve or disapprove the contractor's invoices or draw requests and submit the approved invoices or draw requests to First Gibraltar for payment out of the funds in such account. First Gibraltar shall pay out of such account those draw requests or invoices directly to the contractor within ten (10) days of receipt, with simultaneous notification to plaintiff of payment. First Gibraltar shall have no obligation to pay any sums in excess of the amount in such account plus accrued interest. Upon completion and acceptance by plaintiff of the Work and final payment to the contractor, any funds remaining in such account shall be retained by and belong to First Gibraltar. If completion and acceptance by plaintiff of the Work and final payment to the contractor does not occur within two years from the date First Gibraltar establishes and funds such account, First Gibraltar

may apply to this Court for an order allowing First Gibraltar to withdraw and keep as its own any remaining funds in the Account.

D. Costs of court should be, and are hereby, taxed against First Gibraltar.

E. A severance is ordered, and a separate trial is to be held, with respect to all claims and causes of action asserted by, and all relief sought by, plaintiff against FDIC/Manager-Fund and First Gibraltar that are not resolved by rulings in this order and the Court's memorandum opinion bearing the same date as the date of this order.

F. Entry of final judgment is directed as to all claims and causes of action that are resolved by the rulings in sections A, B, C and D of this order. The Court expressly determines that there is no just reason for delay in entry of final judgment as to such claims and causes of action, and the Court is expressly directing entry of final judgment as to all such claims and causes of action.

SIGNED this 19th day of November, 1990.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

APPENDIX F

TEXT OF STATUTES AND REGULATIONS INVOLVED

Each statute and regulation set forth was that in effect in 1988 upon the declaration of insolvency of First Texas Savings Association.

12 U.S.C. § 1724(b):

> (b) The term "insured member" means an individual, partnership, association, or corporation which holds an insured account. Each officer, employee, or agent of the United States, of any State of the United States, of the District of Columbia, of any Territory of the United States, of Puerto Rico, of the Virgin Islands, of any county, of any municipality, or of any political subdivision thereof, herein called "public unit", having official custody of public funds and lawfully investing the same in an insured institution shall, for the purpose of determining the amount of the insured account, be deemed an insured member in such custodial capacity separate and distinct from any other officer, employee, or agent of the same or any public unit having official custody of public funds and lawfully investing the same in the same insured institution in custodial capacity. Except in the case of an insured member referred to in the preceding sentence, funds held in fiduciary capacity, when invested in an insured institution, shall be insured in an amount not to exceed $100,000 for each such trust estate, and notwithstanding any other provisions of this Act, such insurance shall be separate from and additional to that covering other investments by the

owners of such trust funds of the beneficiaries of such trust estates. Notwithstanding any other provision of law, two persons who are husband and wife shall have, with respect to accounts in an insured institution which are community property of such husband and wife and to the extent that such accounts are community property, not to exceed $100,000 of insurance with respect to such an account or accounts in the sole name of the husband, not to exceed $100,000 of insurance with respect to such account or accounts in the sole name of the wife, and not to exceed $100,000 of insurance with respect to such an account or accounts in the sole name of both: Provided, That in no event shall this sentence increase to an amount which is greater than the total of the amounts hereinbefore set forth in this sentence the aggregate of the insurance which such husband and wife may have under this title with respect to (1) any account or accounts in such institution in the sole name of either of them, or in the sole names of both, and (2) any other account or accounts in such institution to the extent that such other account or accounts would, in the absence of this sentence, be required to be included in determining the amount of the individual insurance of such husband or of such wife under subsection (a) of section 405 [12 USCS § 1728(a)].

12 U.S.C. § 1724(c):

(c) The term "insured account" means a share, certificate, or deposit account of a type approved by the Federal Savings and Loan Insurance Corporation which is held by an insured member in an insured institution and

which is insured under the provisions of this title.

12 U.S.C. § 1725(a):

§ 1725. Creation of Federal Savings and Loan Insurance Corporation

(a) Creation, operation, and offices. There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of a board of trustees to be composed of five members and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this title. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.

12 U.S.C. § 1728(a):

§ 1728. Payment of insurance; statute of limitations with respect to claims; insurance of public funds

(a) Amount of insurance. Each institution whose application for insurance under this title is approved by the Corporation shall be entitled to insurance up to the full withdrawal or repurchasable value of the accounts of each of

its members and investors (including individuals, partnerships, associations, and corporations) holding withdrawable or repurchasable shares, investment certificates, or deposits, in such institution; except that no member or investor (other than a member or investor referred to in subsection (d)) of any such institution shall be insured for an aggregate amount in excess of $100,000. Whenever the liabilities of an insured institution for accounts shall have been assumed by another insured institution or institutions, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract, all accounts so assumed shall have separate insurance which shall terminate at the end of six months from the date such assumption takes effect or, in the case of any certificate account, the earliest maturity date after the six-month period. For the purpose of clarifying and defining the insurance coverage under this subsection, subsection (d) of this section, and subsection (b) of section 401 [12 USCS § 1724(b)], the Corporation is authorized to define, with such classifications and exceptions as it may prescribe, terms used in those subsections and in subsection (c) of section 401 [12 USCS § 1724(c)] and the extent of the insurance coverage resulting therefrom.

(b) Default of insured institutions. In the event of a default by any insured institution, payment of each insured account in such insured institution which is surrendered and transferred to the Corporation shall be made by the Corporation as soon as possible either (1) by cash or (2) by making available to each insured member a transferred account in a new insured institution in the same community or in another

insured institution in an amount equal to the insured account of such insured member: Provided, That the Corporation, in its discretion, may require proof of claims to be filed before paying the insured accounts, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured account, it may require the final determination of a court of competent jurisdiction before paying such claim.

12 U.S.C. § 1811:

§ 1811. Creation of Corporation; duties

There is hereby created a Federal Deposit Insurance Corporation (hereinafter referred to as the "Corporation") which shall insure, as hereinafter provided, the deposits of all banks which are entitled to the benefits of insurance under this Act, and which shall have the powers hereinafter granted.

12 U.S.C. § 1813(*l*)(1)

(*l*) The term "deposit" means –

(1) the unpaid balance of money or its equivalent received or held by a bank in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtness, or other similar name, or a check or draft drawn against a deposit account and certified by the bank, or a letter of credit or a traveler's check on which the bank is primarily

liable: Provided, That, without limiting the generality of the term "money or its equivalent", any such account or instrument must be regarded as evidencing the receipt of the equivalent of money when credited or issued in exchange for checks or drafts or for a promissory note upon which the person obtaining any such credit or instrument is primarily or secondarily liable, or for a charge against a deposit account, or in settlement of checks, drafts, or other instruments forwarded to such bank for collection,

* * *

(3) money received or held by a bank, or the credit given for money or its equivalent received or held by a bank, in the usual course of business for a special or specific purpose, regardless of the legal relationship thereby established, including without being limited to, escrow funds, funds held as security for an obligation due to the bank or others (including funds held as dealers reserves) or for securities loaned by the bank, funds deposited by a debtor to meet maturing obligations, funds deposited as advance payment on subscriptions to United States Government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes: Provided, That there shall not be included funds which are received by the bank for immediate application to the reduction of an indebtedness to the receiving bank, or under condition that the receipt thereof immediately reduces or extinguishes such an indebtedness,

* * *

12 U.S.C. § 1821(f):

> **(f) Payment of insured deposits.** Whenever an insured bank or insured branch of a foreign bank shall have been closed on account of inability to meet the demands of its depositors, payment of the insured deposits in such bank shall be made by the Corporation as soon as possible, subject to the provisions of subsection (g) of this section either (1) by cash or (2) by making available to each depositor a transferred deposit in a new bank in the same community or in another insured bank in an amount equal to the insured deposit of such depositor: Provided, That the Corporation, in its discretion, may require proof of claims to be filed before paying the insured deposits, and that in any case where the Corporation is not satisfied as to the validity of a claim for an insured deposit, it may require the final determination of a court of competent jurisdiction before paying such claim.

12 C.F.R. § 330.1:

> **§ 330.1 General principles applicable in determining insurance of deposit accounts.**
>
> (a) *General.* This Part 330 provides for determination by the Corporation of the insured depositors of an insured bank and the amount of their insured deposit accounts. The rules for determining the insurance coverage of deposit accounts maintained by depositors in the same or different rights and capacities in the same insured bank are set forth in the following provisions of this part. Insofar as rules of local law enter into such determinations, the law of the

jurisdiction in which the insured bank's principal office is located shall govern, except where the insured bank is an insured branch of a foreign bank, in which case the law of the jurisdiction where the insured branch is located shall govern.

(b) *Records.* (1) The deposit account records of the insured bank shall be conclusive as to the existence of any relationship pursuant to which the funds in the account are deposited and on which a claim for insurance coverage is founded. Examples would be trustee, agent, custodian or executor. No claim for insurance based on such a relationship will be recognized in the absence of such disclosure.

(2) If the deposit account records of an insured bank disclose the existence of a relationship which may provide a basis for additional insurance, the details of the relationship and the interests of other parties in the account must be ascertainable either from the records of the bank or the records of the depositor maintained in good faith and in the regular course of business.

12 C.F.R. § 330.3:

§ 330.3 Testamentary accounts.

(a) Funds owned by an individual and deposited in a revocable trust account, tentative or "Totten" trust account, "payable-on-death" account or similar account evidencing an intention that on his death the funds shall belong to his spouse, child or grandchild shall be insured up to $100,000 in the aggregate as to each such named beneficiary, separately from any other accounts of the owner.

(b) If the named beneficiary of such an account is other than the owner's spouse, child or grandchild, the funds in such account shall be added to any individual accounts of such owner and insured up to $100,000 in the aggregate.

12 C.F.R. § 330.101:

§ 330.101 Recognition of deposit ownership in custodial accounts.

(a) The opinion of the Board of Directors has been requested as to whether a fractional or percentage computation of the interests of owners of commingled funds on deposit in custodial accounts in banks insured by the Federal Deposit Insurance Corporation meets the requirements of § 330.1.

(b) Section 330.1 provides that if the name and interest of an owner of any portion of a specifically designated custodial deposit is disclosed on the records of the person in whose name the deposit is maintained and such records are maintained in good faith and in the regular course of business, such owner will be recognized for all purposes of claim for insured deposits to the same extent as if his name and interest were disclosed on the records of the bank.

(c) The Board of Directors has concluded that, if the records of the depositor, maintained in good faith and in the regular course of business, reflect, at all times, the name and ascertainable interest of each owner in a specifically designated custodial deposit, such interest may be determined on a fractional or percentage basis. This may be accomplished in any manner

which indicates that where the funds of an owner are commingled with other funds held in custody and a portion thereof is placed on deposit in one or more insured banks, his interest in a custodial deposit in any one insured bank would represent at any given time the same fractional share as his share of the total commingled funds.

12 C.F.R. § 564.1:

§ 564.1 Settlement of insurance upon default.

(a) *General.* In the event of a default by an insured institution, the Corporation will promptly determine, from the account contracts and the books and records of the institution, or otherwise, the insured members thereof and the amount of the insured account or accounts of each such member. The Corporation will give to each Insured member shown to be such on the books of the insured institution written notice of the time and place of payment of insurance by mail at the last known address as shown by the books of the insured institution. If an insured institution has outstanding at the time of default any account or accounts issued in negotiable instrument form, the Corporation shall, promptly after default, publish (in a newspaper printed in the English language and of general circulation in the city, county, or locality in which the principal office of such insured institution is located) a notice to all account holders of such insured institution of the time and place of payment of insurance.

(b) *Amount of insured account.* The amount of an insured account is the amount

which the insured member would have been entitled to withdraw as of the date of default, plus interest on any savings account accrued to such date or dividends prorated to such date at the announced or anticipated rate without regard to whether such account is subject to any pledge:

Provided, That the amount of an insured account shall not include any amount the accrual or payment of which is any way contingent or, in the case of a share account, which has not been announced as of the date of default under the terms of the account. In the case of a savings account with a fixed or minimum term or a qualifying or notice period that has not expired as of such date, dividends or interest thereon shall be computed as if the account could have been withdrawn on such date without any penalty or reduction in the rate of earnings.

12 C.F.R. § 564.2(b)(1):

The account records of the insured institution shall be conclusive as to the existence of any relationship pursuant to which the funds in the account are invested and on which a claim for insurance coverage is founded. Examples would be trustee, agent, custodian or executor. No claim for insurance based on such a relationship will be recognized in the absence of its disclosure on such records.

12 C.F.R. § 564.3(b):

(b) *Accounts held by agents or nominees.* (1) Funds owned by a principal and invested in one or more accounts in the name or names of

agents or nominees shall be added to any individual accounts of the principal and insured up to $100,000 in the aggregate.

(2) A loan servicer who receives loan payments and places or maintains such payments in an insured institution prior to remittance to the lender or other parties entitled to the funds shall, for insurance-of-accounts purposes, be considered an agent of each borrower.

12 C.F.R. § 564.4(a):

§ 564.4 Testamentary accounts.

(a) Funds owned by an individual and invested in a revocable trust account, tentative or "Totten" trust account, payable-on-death account or similar account evidencing an intention that on his death the funds shall belong to his spouse, child or grandchild shall be insured up to $100,000 in the aggregate as to each such named beneficiary separately from any other accounts of the owner.

12 C.F.R. § 564.5:

§ 564.5 Accounts held by executors or administrators.

Funds of a decedent held in the name of the decedent or in the name of the executor or administrator of his estate and invested in one or more accounts shall be insured up to $100,000 in the aggregate, separately from the individual accounts of the beneficiaries of the estate or of the executor or administrator.

12 C.F.R. § 564.10:

§ 564.10 Trust accounts and IRA and Keogh accounts.

All trust estates for the same beneficiary invested in accounts established pursuant to valid trust arrangements created by the same settlor (grantor) shall be added together and insured up to $100,000 in the aggregate, separately from other accounts of the trustee of such trust funds or of the settlor or beneficiary of such trust arrangements, except that (a) all vested and ascertainable interests of the same beneficiary which qualify under section 401(d) of the Internal Revenue Code of 1954 shall be added together and insured up to $100,000 separately from any trust interests of the beneficiary, (b) all vested and ascertainable interests of the same beneficiary which qualify under section 408(a) of the Internal Revenue Code of 1954 shall be added together and separately insured up to an additional $100,000, and (c) all trust estates as defined in § 561.4(b) of this subchapter shall be added together and separately insured up to an additional $100,000.

12 C.F.R. Part 564 (Appendix):

APPENDIX – EXAMPLES OF INSURANCE COVERAGE AFFORDED ACCOUNTS IN INSTITUTIONS INSURED BY THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

The following examples illustrate insurance coverage on accounts maintained in the same insured institution. They are intended to cover

various types of ownership interests and combinations of accounts which may occur in connection with funds invested in insured institutions. These examples interpret the rules for insurance of accounts contained in 12 CFR Part 564.

The examples, as well as the rules which they interpret, are predicated upon the assumption that invested funds are actually owned in the manner indicated on the institution's record. If available evidence shows that ownership is different from that on the institution's records, the Federal Savings and Loan Insurance Corporation may pay claims for insured accounts on the basis of actual rather than ostensible ownership.

APPENDIX G

FDIC Advisory Opinion 91-70,
Fed. Banking L. Rep. (CCH)
¶ 81,448, dated August 8, 1991

1414 10-25-91 55,639

FDIC Advisory Opinions
Handling Depositor Claims Against Failed Bank

BANK FAILURES

[¶ 81,448] Handling of Claims Where Depositor Alleges That Balance of Account Is less Than It Should Be Due to Negligence or Willful Wrongdoing of Employees of Insured Failed Depository Institution.

Roger A. Hood, Assistant General Counsel
FDIC-91-70, August 8, 1991. Interpreting 12 USC 1813(1)(¶ 47.212).

This is in response to your memorandum of July 3 seeking our views on the handling of claims in cases in which a depositor in a failed insured depository institution alleges that, due to the negligence or willful wrongdoing of an employee of the institution, the depositor's account balance, as shown on the failed institution's records, is less than it should be. Our comments reflect an FDIC point of view and are offered for informational purposes only.

In my opinion, money belonging to a depositor that is tendered to, and received by, an insured institution for deposit, but that is not credited to the depositor's account, due to the negligence or willful wrongdoing of

an employee of the institution, should be treated as a deposit in fact. Similarly, money belonging to a depositor that is so tendered and received and properly credited to the depositor's account, but that is improperly deducted from that account, due to the negligence or willful wrongdoing of an employee of the institution, should be treated as remaining in the account. However, a mere allegation of negligence or willful wrongdoing should not be accepted for these purposes. Rather, there should be convincing evidence to support the allegation. Such evidence may be found, for example, in the records of the depository institution, in the records of the depositor and perhaps on occasion in affidavits by reliable and knowledgeable disinterested persons. Of course, the burden would be on the depositor to produce the requisite evidence, but the FDIC, which would possess the institution's records, ought to be reasonably cooperative.

When there is convincing evidence that, due to the negligence or willful wrongdoing of an employee of a failed insured institution, a depositor's account balance, as shown on the institution's records, is less than it should be, then the precepts of equity require, I think, that the depositor should be permitted to include the amount of the deficiency in a claim for deposit insurance. This would leave the FDIC, as (insurer and) subrogee, to seek reimbursement for the insurance payment from the receivership, which presumably would ordinarily have a bond claim based on the misconduct of the failed institution's employee. The deposit holder would have no need or right to file a claim against the receiver except for the portion of the deposit account, adjusted for the deficiency, in excess of the insured amount, if any.

When there is a lack of convincing evidence to support the allegation by a depositor that, due to the negligence or willful misconduct of an employee of a failed institution, the depositor's account balance is less than it should be, then the depositor should be permitted to file a claim in the amount which the depositor maintains is the true balance of the account. The claim will be allowed only in the amount recognized by the insurer as the proper balance. The disputed difference would not be recognized as a deposit for insurance or receivership purposes until the parties reached agreement or the issue was determined by a court. Because the insurance claim exists only if there is a deposit liability owed by the institution, the insurance claim should suffice for both purposes.

I offer the following comments with respect to the two specific examples cited in your letter.

The first involves an unauthorized withdrawal from an account of a decedent. The attorney representing the estate was reluctant to file a receivership claim, but apparently did so, and also filed a claim as an insured depositor. If the questioned withdrawal was, in fact, unauthorized and the savings and loan association was negligent in permitting it, the association's deposit liability would not have been discharged and the withdrawn amount should still be considered to be part of the deposit. The claim for deposit insurance would constitute a claim against the receivership to which FDIC would be subrogated to the extent of the insurance payment, and retained by the depositor to the extent the amount was in excess of the insured amount. The one claim serves both purposes and a separate claim is not required. In the

event the withdrawn amount is found to have been authorized, or caused by the negligence of the depositor, the amount would not represent a deposit liability of the institution, and would not be insured. In this case, the claim would be approved and paid in the amount found to be due to the depositor and the withdrawn amount would not be recognized as a claim against the receivership.

Your second example involves an account opened with minimal funds, increased by a forged instrument and then reduced by a withdrawal by the forgers. The account holder claims insured deposit status in the amount withdrawn by the forgers. I assume that the amount in question consists of the "funds" deposited in the form of the forged instrument.

The forged instrument does not constitute "money or its equivalent" as that term is used in section 3(*l*) of the FDI Act (12 U.S.C. 1813(*l*)). Accordingly, that part of the deposit balance attributable to it would not be recognized as a deposit insurance claim of the account holder, nor would it represent a claim against the receivership.